

No. **82-1098**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ISIDORO RODRIGUEZ,
Appellant

vs.

DISTRICT OF COLUMBIA DEPARTMENT
OF EMPLOYMENT SERVICES,
Appellee

APPEAL FROM
THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the District of Columbia Self-Government and Government Reorganization Act, Pub. L. 93-198, 87 STAT. 774(1973) (hereafter cited as Reorganization Act), an Act of Congress delegating legislative power to the District of Columbia Government with mandated standards and rules of conduct to be followed by city officials, is a "statute of the United States" for purposes of appeal under 28 U.S.C. §1257(1)?
2. Whether, given the fact that an invalid personnel action (Form 1) had been fraudulently prepared and signed by the City Administrator, Mr. Elija Baby Rogers, and the Director of the D.C. Office of Personnel, thus causing no valid personnel action to be authorized which could have changed Mr. Rodriguez's volunteer service with the D.C. Office of Employee Appeals to one of employee for compensation, did the Executive Office of the Mayor violate

Section 422(2) and (3), 446, 447, and 714(c) of the Reorganization Act by repeatedly alleging that Mr. Rodriguez was employed for compensation while collecting unemployment compensation?

3. Whether, given the fact that the D.C. Office of Employee Appeals had not received Congressional authorization for a budget or to hire personnel for FY80 and that no supplemental budget had as yet either been submitted or approved for FY 80, did the Executive Office of the Mayor violate Sections 446, 447, and 603(a) of the Reorganization Act in repeatedly alleging that Mr. Rodriguez was employed for compensation with the Office of Employee Appeals?
4. Whether the administrative process of the D.C. Department of Employment Services; Mr. Ivanhoe Donaldson, Special Assistant to Mayor Barry/ Acting Director of the Department of Employment Services; and the District of Columbia Court of Appeals (an

Article I, legislative court) violated Sections 422(2) and (3), 446, 447, 603, and 714(c) of the Reorganization Act, in finding Mr. Rodriguez's volunteer service agreement with the Office of Employee Appeals was changed to one of an employee for compensation through the signing of the oath of office form (Appointment Affidavit) without the existence of a valid personnel action (Form 1), as required by an Act of Congress and numerous Comptroller General Decisions?

5. Whether Mayor Marion Barry of the District of Columbia has the authority to amend an Act of Congress and an act of the City Council, which vested the District Unemployment Compensation Board with plenary authority to administer and render final decisions under the District Unemployment Compensation Act?

a. Whether Mr. Ivanhoe Donaldson, Special Assistant to the Mayor/ Acting Director of the Department of Employment

Services, has the statutory jurisdiction under the District Unemployment Compensation Act to issue a valid final decision for the Unemployment Compensation Board?

b. Whether the personnel in the Department Employment Services has the necessary jurisdiction to administer the District Unemployment Compensation Program?

6. Whether, given that the current District Unemployment Compensation hearing process under the direct control of Mayor Marion Barry, or one of his agents, and the record shows that Mr. Rodriguez has over the past three years repeatedly alleged criminal malfeasance on the part of Mayor Barry and his agents in violation of Federal and District law, did Mr. Rodriguez receive a fair and impartial hearing either in the administrative hearing process or within the D.C. Court of Appeals (an Article I, legislative court)

as required by the Fifth Amendment to the Constitution?

7. Whether, given the numerous procedural violations, which include but are not limited to the following: denial of access to documents which were under the control of the District Government; denial of a copy of the claims deputy findings of fact and determination; denial of repeated motions to the District Court of Appeals to correct mistakes and omissions in the record submitted by the District Government; denial to both a speedy administrative hearing and a judicial hearing on the issue of jurisdiction, was Mr. Rodriguez denied his right to due process under the Fifth Amendment?
8. Whether, given that Mr. Rodriguez was repeatedly denied his requests to subpoena documents or witnesses throughout the hearing process, was he denied his right to due process under the Fifth Amendment?

9. Whether Mr. Rodriguez's right to free speech and his right to petition Congress secured under the First Amendment were violated by retaliatory acts, including the raising of false unemployment compensation fraud allegation, by the Government of the District of Columbia?
10. Whether the Council of the District of Columbia violated section 302, 602(a)(3) of the Reorganization Act, and the Constitutional prohibition on ex post facto laws, when it passed two acts in late 1981 which retroactively attempted to vest Mayor Marion Barry with authority for the Unemployment Compensation program, which he previously did not have?

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The District of Columbia Self-Government and Government Reorganization Act, Pub. L. 93-198, 87 STAT. 774(1973), an Act of Congress which organized the current

District Government structure and delegated legislative power to city officials in accord with the requirements of this Court, that such delegation contain standards and rules of conduct to be followed, is either a "statute of the United States" for purposes of appeal under 28 U.S.C. §1257(1), this to enable the Supreme Court to assure that Congress's delegation of legislative authority is followed; or conversely, the District of Columbia Self-Government and Government Reorganization Act, supra. is not a "statute of the United States", in which case the current District Government structure is un-Constitutional since the required standards and rules of conduct are not present to make a valid legislative delegation.

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OPINIONS BELOW

The Audit Letter of A. Dailey and J. Persetic, dated April 3, 1980. The "Amended" Audit letter of Claims Examiner J. Matson, dated April 18, 1980. The Decision of Appeals Examiner Allen Weil, dated February 20, 1981. The Proposed Finding of Fact and Decision of the Special Assistant to the Mayor/Acting Director of the Department of Employment Services, Mr. Ivanhoe Donaldson, dated June 18, 1981. The final decision of the Special Assistant to the Mayor/Acting Director Department of Employment Services, Mr. Ivanhoe Donaldson, dated July 7, 1981. The Determination by Claims Deputy J. Matson, dated July 20, 1981. The Memorandum Opinion and Judgement of the District of Columbia Court of Appeals, dated August 5, 1982(81-900) a copy is Appendix A. The Order of the District of Columbia Court of Appeals denying a Petition for Rehearing En Banc, dated October 5, 1982, a copy is Appendix B.

JURISDICTION

This Civil appeal has repeatedly drawn into question: First, Congress's mandate that District officials comply with the requirements of the Reorganization Act, and second, the elements required as a condition precedent to employment and compensation within the Government of the District of Columbia and the validity of the authority and jurisdiction of the District Unemployment Compensation Board to administer and render a final decision under the District Unemployment Compensation Act, D.C. Code §46-301, et. seq. (1973). The decision of the District of Columbia Court of Appeals goes against the requirements and mandate of the Reorganization Act, a statute of the United States.

On April 4, 1980 petitioner filed an appeal to the Audit letter of April 3, 1980. Another appeal was filed on April 23, 1980, (with an addendum on April 28), to the "Amended" Audit letter dated April 18, 1982. An appeal of the Decision of Appeals Examiner,

dated February 20, 1981, was filed on February 27, 1981. On June 27, 1981, an appeal was filed to the Proposed Finding of Fact and Decision by the Special Assistant to the Mayor/Acting Director of the Department of Employment Services, dated June 18, 1981. A Final Decision was issued on July 7, 1981.

Timely Petition for Review was filed with the District of Columbia Court of Appeals on July 21, 1981.

Nearly two and a half years after the beginning of the administrative appeal process, the Memorandum Opinion and Judgement of the District of Columbia Court of Appeals, was entered on August 5, 1982.

A timely Petition for Rehearing En Banc was filed on August 18, 1982, and was denied on October 5, 1982.

The Notice of Appeal to this Court was filed on October 18, 1982, with the Clerk of the District of Columbia Court of Appeals.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(1).

A case in support of jurisdiction is Key V. Doyle, 434 U.S. 59(1977), reh. denied 434 U.S. 1025(1977).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The revelant provisions of the Consti-
tution, and the District of Columbia Self-
Government and Government Reorganization Act,
are set forth in Appendix D, (hereinafter
cited as Reorganization Act).

STATEMENT OF THE CASE

Mr. Isidoro Rodriquez, a resident of the
State of Virginia, was employed as Acting
Legal Counsel/Expert Consultant to the Execu-
tive Office of the Mayor for the District of
Columbia from April 28, 1979 thru December 4,
1979.¹ Subsequent to a closed advisory
briefing to Mayor Marion Barry; Special
Assistant, Ivanhoe Donaldson; City Adminis-
trator, Elija Baby Rodgers; and the Director
of the Office of Personnel, Mr. Jose Gutier-
rez, without notice or reason Mr. Rodriguez
was removed from his office at 4:30 P.M. on
December 4, 1979.²

In a letter to the Mayor, Mr. Rodriguez stated that litigation would commence for breach of his employment contract and violation of his civil rights, unless monies owed were paid.³

On January 7, 1980 Mr. Rodriguez filed for unemployment compensation insurance benefits. Both Mr. Rodriguez and the base period employer, the Executive Office of the Mayor, Office of Personnel, were mailed, on January 23, 1980, copies of a determination of eligibility. Furthermore, each time Mr. Rodriguez reported for and was paid unemployment compensation benefits for weeks ending January 20, thru March 22, 1980, the Executive Office of the Mayor, Office of Personnel, which included an Unemployment Monitoring Branch, received notification (see Tab W-2 of the Record on file with D.C. Court of Appeals. On the reverse side of these notifications, the Office of the Mayor was directed to inform the Unemployment Compensation Board if it was

believed that the claimant (Mr. Rodriguez) was not unemployed or was otherwise ineligible.

During this period, Mr. Rodriguez sought out employment. On January 23, 1982, the newly appointed members of the Office of Employee Appeals for the District of Columbia, (hereafter cited as OEA) met with Mr. Rodriguez to discuss the possibility of contracting for his services.⁴ The issue confronting the members, and in particular the Chairperson, Ms. Sharron Banks, who was the chief administrative officer and was the only one authorized to hire for OEA, was how to pay for the services of Mr. Rodriguez, when they had not been included in the District's FY 80 Budget, and thus had no Congressional authorization for OEA's establishment, budget, or ability to hire.⁵

After numerous discussions with Ms. Banks between January 23 and February 4, 1980, it was mutually agreed that Mr. Rodriguez would work as a volunteer to OEA pending the development of a contract of employment. It was

further agreed that the Mr. Rodriguez would draft the necessary regulation to make OEA operational, develop a proposal for an organizational structure, and assist the Chairperson in developing a Supplemental Budget request for FY 80 to be presented to Congress. Finally, it was agreed that once a supplemental budget had been approved by Congress for FY 80, Mr. Rodriguez would be compensated for the services he performed. (Note footnote 8) Until Congress acted, he had no idea whether he would ever be paid for volunteer services to OEA.⁶ (Congress passed OEA's budget request in November 1980.)

On February 4, 1980, Mr. Rodriguez began performing volunteer service to OEA, and signed a document entitled Appointment Affidavit.⁷ At the time of signing, the form was neither notarized nor witnessed in any fashion.

While performing the above mentioned volunteer work, Mr. Rodriguez continued to apply for and received his unemployment

compensation insurance.⁸ During this period, in addition to the above events, Mr. Rodriguez received a check in early February and one in mid-March from the Executive Office of the Mayor, Office of Personnel. They were sent without any pay stub to designate the dispersing agency, but when Mr. Rodriguez inquired, he was informed over the telephone that they related to his former service with the Office of Personnel.⁹ Despite repeated request, no documents were given to Mr. Rodriguez.

On March 18, 1980, Mr. Rodriguez received an individual pay stub with no reference to what agency it related to. Mr. Rodriguez, as well as Mr. Val Harris, the OEA Office Manager on detail for the City Administrators Office were informed by telephone it was attributed to the Office of Employee Appeals for payment of services of Mr. Rodriguez. During the subsequent two weeks, despite repeated attempts to get information as to how this was possible, since as yet the Office had not even

submitted its Supplemental Budget request to Congress for FY 1980, Mr. Rodriguez was provided with no information as to what changed his volunteer status or how an office, as yet unauthorized by Congress, could have money or authority to hire.

On April 1, 1980, Mr. Herbert Reid, Legal Counsel to the Mayor informed Mr. Rodriguez that the Internal Operations Unit of the D.C. Metropolitan Police Force had been ordered to arrest Mr. Rodriguez on the charge of unemployment compensation fraud the next day when he went down to sign for unemployment compensation benefits. Mr. Rodriguez responded that given the fact that the Executive Office of the Mayor had been informed each time that Mr. Rodriguez received unemployment compensation and that information had been repeatedly denied when requested, it was very clear that a conspiracy had been underway against Mr. Rodriguez.¹⁰ Mr. Rodriguez at that time stated that he would use the administrative process to clear the record and his

name (by April 1, the D.C. Government had already widely distributed documents that Mr. Rodriguez was guilty of unemployment fraud).

On April 4, 1980, Mr. Rodriguez met with Mr. George L. Jackson, Acting Assistant Director, Unemployment Compensation; and Mr. James Matson, Claims Examiner. At this time, a letter dated April 1, 1980 and a certified check for one thousand dollars were delivered. Mr. Rodriguez stated in the letter, he was paying \$1000.00 to, "foreclose the appearance of impropriety...and to commence a review of his unemployment compensation claim."

On the same day, Mr. Jackson handed Mr. Rodriguez an audit letter dated April 3, 1980. The letter was notification of a redetermination of Mr. Rodriguez's eligibility to receive benefits and an overpayment of \$1267.00, and stated further that, "[t]his is a result of not reporting that you became a full-time employee as of 2-4-80 and you are no longer unemployed."¹¹

Prior to and after reading the letter Mr. Rodriguez objected to not having an opportunity to respond to the allegation of being employed or of having a possible overpayment. Further, he noted that there appeared to have been serious violations of his rights by individuals in the Executive Office of the Mayor, Office of Personnel, and the Department of Employment Services.

Mr. Rodriguez stated that he had filed a formal appeal to the audit letter. To this Mr. Jackson responded to Mr. Rodriguez to be careful, since it was his experience that the District was prone to do "unethical things." Mr. Jackson stated that it was already decided by "higher authority" to find Mr. Rodriguez disqualified for two years for violating D.C. Code 46-319(e)(1973).¹²

Mr. Rodriguez was told that he would be receiving shortly thereafter an "amended" letter of notification from Mr. Matson.¹³ With this the meeting ended.

On April 7, 1980, Mr. Rodriguez met with Mr. Matson to object to the lack of regulations governing the procedures to be followed in an appeal and to determine where the Unemployment Compensation Board was located.¹⁴

On April 18, 1980, Mr. James Matson, Claims Examiner, issued his "amended" letter of notification that an audit revealed that an overpayment had existed.

I

On April 23, 1980 (and in the addendum of April 28, 1980), Mr. Rodriguez, for the first, time, raised to Mr. Matson the question of non-compliance with an Act of Congress regarding budget authorization, employment in accord with Comptroller General requirements and procedural due process. This was done verbally as well as in writing. These issues were not dealt with at any point.

On April 23, 1980, Mr. Rodriguez filed an appeal to Mr. Matson's notification of a redetermination. The appeal was on the issue

of overpayment and the issue of being employed.¹⁵

During the subsequent week, Mr. Rodriguez was in contact with Mr. Matson, and on April 28, Mr. Rodriguez delivered an addendum to his April 23, 1980 letter. This addendum spelled out the factual and legal issues, showing that Mr. Rodriguez never had information as to being employed nor could he have received income, since the Office of Employee appeals had not received any budget or hiring authorization from Congress for FY 80, as required by the Reorganization Act, Section 446 and 447 (See Appendix D). As further grounds for appeal, the addendum listed numerous procedural errors in violation of Mr. Rodriguez's statutory and Constitutional rights, including the refusal to maintain confidentiality and to provide him information to prepare an appeal, D.C. Code 46-313(f)(1973), and alleged that the Mayor, et al., were guilty of violation of D.C. Code §46-317(b) and 46-319(b)(1973) for falsifying employment records.

At the April 28th meeting, Mr. Matson, stated that he had already made his determination as required by "19(e)." When Mr. Rodriguez asked for a copy of it, Mr. Matson said that he could not give him a copy, but would allow him to read it and take notes.¹⁶ Mr. Rodriguez objected at this time to not having a copy of findings in order to develop an appeal as required by D.C. Code 46-319(e)(1973). In addition, he objected to not being shown the record as required by Section 46-311(f) and Section 46-313(f) of the D.C. Code, to determine what facts were used to support Mr. Matson's decision. Finally, Mr. Rodriguez raised the question of how the claims examiner, who develops the audit letter, could be the claims deputy, who was to make the findings for a Section 46-319(e) determination.

In early May, 1980, Mr. Rodriguez made a number of written requests for information, under both District and Federal law, which were in the hands of Mayor Marion Barry, the

Chief of Police of the D.C. Metropolitan Police Force, and the Director of the Unemployment Compensation Board. None of these requests were complied with.

On May 20, 1980, Mr. Rodriguez received notice that a hearing would be held on May 30, 1980, on the issue of:

Whether section 19(e)(sic) of the District Unemployment Compensation Law with a declaration of ineligibility for a full two years would be enforced.

On May 26, 1980, Mr. Rodriguez was informed by Ms. Jones of the Appeals Section that the Hearing Examiner had granted the Executive Office of the Mayor, Office of Personnel a postponement. Mr. Rodriguez objected to this since he neither had written notification in order to file a motion in opposition, nor had he been informed of what constituted the showing of good cause to permit the postponement.

On June 20, 1980, Mr. Rodriguez wrote to Ms. Jones of the Appeals Section to again object to the fact that no new hearing date had been set and that as yet, no written

notice granting the postponement had been sent. In addition, Mr. Rodriguez requested a copy of Unemployment Compensation regulations and the "necessary form to request discovery."

On July 3, 1980, Mr. Rodriguez received a notice of a rescheduled hearing set for July 16, 1980, to be conducted by Hearing Examiner Allen Weil. In addition to the hearing on July 16, 1980, hearings were held on October 9, November 18, and December 2, 1980.

II

On July 16th, 1980, and throughout the other above mentioned hearings, Mr. Rodriguez, for the second time, raised the question of non-compliance with an Act of Congress regarding budget authorization, employment in accord with Comptroller General requirements, and procedural due process. The methods of raising these questions were both in writing and in oral argument. Finally, the manner in which the issues were passed on was to ignore them.

Throughout the hearing, Mr. Rodriguez made vigorous and timely objections to the manner in which the hearings were being conducted: not only was Mr. Rodriguez denied the right to submit documents in his defense, and the right to conduct discovery, including the right to subpoena witnesses and obtain a copy of the findings of the Claims Deputy, but also the Hearings Examiner refused to deal with any of the alleged violations of Mr. Rodriguez's rights under the Unemployment Compensation Act.¹⁷ Furthermore, throughout the hearing, Mr. Rodriguez objected vigorously to Weil's conduct and rulings which showed a clear lack of impartiality and bias to the Government of the District of Columbia.

On August 16, 1980, Mr. Rodriguez withdrew one portion of his appeal with regard to overpayment, since it was explained to him that he could only appeal that issue within the ten day period after receipt of notice of

eligibility on January 23, 1980. Mr. Rodriguez continued his appeal of overpayment as it related to being allegedly employed.¹⁸

During the entire hearing process, the Executive Office of the Mayor, Office of Personnel, had based its case in chief on two documents: first, a Personnel Action (Form 1) signed on February 20, 1980 by Ms. Otis L. Jackson for the Acting Director of the Office of Personnel, and co-signed by the City Administrator Elija Baby Rodgers (without the knowledge or approval of OEA) with no date as to when it was signed and with a retroactive effective date to February 4, 1980; and second, an Appointment Affidavit signed by Mr. Rodriguez on February 4, 1980, but with a notary's signature of Ms. Sandra Michaels dated February 20, 1980.

In response to this, through vigorous cross-examination of the Chairperson, Ms. Banks, Mr. Rodriguez compelled her to admit that she had not given anyone the authority to prepare a personnel action for her or to sign

it, that neither she nor Mr. Rodriguez knew or approved of the personnel action, and Ms. Banks stipulated during the hearing that there was no Office of Employee Appeals with which Mr. Rodriguez could be employed.¹⁹

In addition to repeatedly noting and having reaffirmed by the Government's witnesses that the OEA had no Congressional authorization to hire, Mr. Rodriguez, both in oral argument²⁰ and in a closing brief filed on December 12, 1980 with the Appeals Section of the District of Columbia Department of Labor, noted that the District Government was required to comply with Comptroller General Decisions, Section 422(3), 603 and 714(c) of the Reorganization Act.

Consequently, judicial notice had to be given to the Federal law as to the essential requirements to being "employed" and receiving compensation, which included a valid personnel action and an oath of office that must be completed prior to being on the payroll.²¹

First, there must be an entrance on duty under a valid appointment before payment of compensation is authorized. For an appointment to be valid there must be an authorized position in accordance with applicable laws, and the head of the agency must have signed the appointment document. The appointment is evidenced by an official personnel action which must contain valid information and is separate and apart from the document which evidences the oath of office. 20 Comp. Gen. 267 (1940) and cases cited therein.

Second, the appointment is effective from the date of acceptance on duty only after the appointing power actually takes action, unless a later date is stated in the appointment. 5 U.S.C. 303(b) and D.C. Code § 1-336.1(c) and (g)(Supp. VII, 1980), designating only the Chairperson of OEA as having power to appoint for the independent agency. Furthermore, the appointment may not be made retroactively effective to cover service previously rendered, 18 Comp. Gen. 907 (1939), 20 id.

267(1940). cf. 54 Comp. Gen. 1028(1975). An employee is not entitled to compensation for any period prior to the date of a valid appointment action, although during such period he may have actually performed the duties of the position and taken the oath of office, 4 Comp. Gen. 675(1975). Finally to have a valid appointment under the District's new merit personnel law, the nature of the appointment must be made known to the employee prior to effecting the appointment, D.C. Code § 1-339.4(e)(Supp. VII, 1980).

As to the purpose of the Appointment Affidavit, it serves only as an oath to defend the Constitution and an affidavit that the office has not been purchased, which is not a personnel action creating an appointment, 5 U.S.C. 3333. It serves merely as a condition precedent to the payment of any compensation due only after a valid appointment has been executed. 21 Comp. Gen. 817(1947). 40 Comp. Gen. 500(1961).

In closing his brief, Mr. Rodriguez turned to the facts of the case to note that the Personnel Action (Form 1) was not only invalid because it was retroactive, but also because it was not signed by an authorized official of OEA. Finally, since the personnel form has not been shown to or accepted by Mr. Rodriguez, it was beyond question that the form was invalid. Consequently, the Appointment Affidavit which Mr. Rodriguez signed on February 4, 1980 when he commenced volunteer service, standing alone did not change his status to an employee for compensation.

On February 20, 1981, Hearing Examiner Weil issued his decision, which affirmed the holding of Mr. Matson that there was an overpayment, but that there was no violation of Section 19(e) Fraud. For the second time the hearing officer refused to pass on the question raised that is now before this Court.

III

On February 27, 1981, Mr. Rodriguez, for the third time, raised the question of non-compliance with an Act of Congress regarding budget authorization, employment in accord with Comptroller General requirements, and procedural due process. The methods used to raise these questions were both written and oral statements. Finally, the manner in which the issues were passed on was to ignore them.

On February 27, 1981, Mr. Rodriguez filed an appeal of the decision with the Office of Appeals and Review, D.C. Department of Employment Services, Office of Unemployment Compensation. The basis of appeal was falsification of personnel documents, violation of procedural due process, and violation of Mr. Rodriguez's Constitutional and statutory rights.

On the same date Mr. Rodriguez made a formal request to the Director, Office of Unemployment Compensation, for copies of the Claim record, exhibits from the hearing and a

transcript of the hearing. On March 11, 1982, the Associate Director, Office of Unemployment Compensation, agreed to supply the requested material. Up to this point, Mr. Rodriguez had been totally unsuccessful in attempts to obtain any information to prepare an appeal or to document for his defense. All this information was and is in the hands of the District Government.

On April 4, 1981, Mr. Rodriguez received notice that the Executive Office of the Mayor, Office of Personnel had filed an appeal to Hearing Examiner Weil's decision regarding denial of the 19(e) disqualification against Mr. Rodriguez.²²

On June 12, 1982, Mr. Rodriguez appeared before the Committee on Government Operations, Oversight Hearing on "The Implementation of the District of Columbia Comprehensive Merit Personnel Act of 1978(D.C.Law 2-139)", and presented opposing testimony to that of Mr. Ivanhoe Donaldson, Special Assistant to the Mayor/Acting Director Department of Employment

Services. Mr. Rodriguez alleged that willful non-compliance with the Congressional mandate was being conducted by the Barry Administration's handling of Disability Compensation program for City Employees.²³

On June 22, 1982, Mr. Rodriguez received a copy of the Proposed Finding of Fact and Decision of Mr. Ivanhoe Donaldson, Acting Director, Department of Employment Services. In his decision, Mr. Donaldson affirmed the two lower decisions as to overpayment, but reversed on the issue of no 19(e) disqualification, and found that Mr. Rodriguez had been employed with the Office of Employee Appeals from February 4, 1980 thru March 1980, and thus was guilty of fraud pursuant to 19(e).

IV

For the fourth time Mr. Rodriguez raised the questions presented of non-compliance with an Act of Congress regarding budget authorization, employment/compensation procedures of the Comptroller General, and substantive and procedural due process. The method of raising

these questions was in writing. For the first time in writing, Mr. Rodriguez raised a challenge to jurisdiction. Finally, for the fourth time questions raised were not dealt with in any manner.

On June 27, 1982, Mr. Rodriguez replied to the Proposed Finding of Fact and Decision, in addition to the same issues, the authority of Mr. Donaldson to make a determination for the District Unemployment Compensation Board was challenged. This challenge was not only based on the fact that Mr. Donaldson was not a member of the Board, as required by Federal Statute as well as District law, but as importantly, Mr. Rodriguez, during the past year had made numerous allegations of malfeasance on the part of both Mayor Marion Barry and Mr. Donaldson, and thus alleged non-receipt of a fair hearing.

On July 9, 1981, Mr. Rodriguez received the Final Decision of Mr. Donaldson. In response to Mr. Rodriguez's challenge of lack of jurisdiction, Mr. Donaldson stated that the

powers, duties and functions of the District Unemployment Compensation Board were transferred to the Director of the Department of Employment Services (formerly the Department of Labor) by the Mayor's Reorganization Plan No. 1 of 1978 and 1980. Finally, despite the facts to the contrary, Mr. Donaldson stated that "nothing in the record indicates that the Claimant requested copies of any document." Therefore he affirmed on the finding of overpayment and reversed on the non-finding of fraud-Section 19(e).

V

On July 21, 1982, a timely Petition for Review was filed with the District of Columbia Columbia Court of Appeals.

For the fifth time Mr. Rodriguez raised the question of non-compliance with an Act of Congress regarding budget authorizatiton, employment in accord with Comptroller General requirements, and procedural due process (in particular, failure to maintain and supply a record, as well as refusal to supply subpoenas

for witnesses and documents). In addition, Mr. Rodriguez challenged the issue of the District Department of Employment Services' jurisdiction in unemployment compensation matters. The methods used to raise these questions were both in numerous motions, in a written brief, and in oral argument.

Between July 21, 1981 and October 8, 1981, Mr. Rodriguez filed the following motions with the District of Columbia Court of Appeals:

On July 22, 1981, Motion for an expedited hearing for a stay pending expedited review due to lack of jurisdiction.²⁴

On July 30, 1981, Motion to Object to Respondent's Counsel And to Require the Representation By D.C. Corporation Counsel of the District Department of Employment Services, due to lack of jurisdiction.

On July 30, 1981, Petitioner's Reply to Response in Opposition to Appellant's Motion for Stay Pending Review.

On August 6, 1981, Motion for Reconsideration of Petitioner's July 22, 1981, Motion for Stay Pending Review.

On August 7, 1981, Petitioner's Reply to Respondent's Response of August 3, 1981.

On August 14, 1981, Petitioner's Response to a Motion for Enlargement of Time to File The Record.

On August 17, 1981, Petitioner's Motion to Require the Filing of a True and Original Record.

On August 18, 1981, Stipulations To the Transcript Filed By Respondent, August 14, 1981; A Motion To Strike; A Motion To Require The Filing of the Initial Determination of Mr. James Matson, Dated April 23, 1980; Motion to Require the Filing of the Original Appointment Affidavit; Reply to Respondent's Response to Motion to Require the Filing of a True and Original Record.

On September 29, 1981, Motion to Require the Filing of Payroll Register and Time/Att. Sheets; Two Separate Motions To Correct Omissions In The Record; Motion To Require The Examination of the Original Taped Testimony; Motion for Enlargement of Time To File Petitioner's Brief.

The District of Columbia Court of Appeals denied the July 22nd Motion for Stay on August 3, 1981. On October 8, 1982, the Court of Appeals denied the motions for reconsideration and to strike respondent's counsel. It granted Mr. Rodriguez enlargement of time to file his brief since it had already been filed, but then the Court of Appeals deferred the time the District of Columbia Department of Employment Services was to file its brief

pending resolution of the number of motions regarding the record.

As noted, on October 7, 1982, Mr. Rodriguez filed his extensive Brief and Argument with the Court of Appeals. Four issues were presented for review.

On October, 19, 1981, Mr. Rodriguez again filed with the District Court of Appeals a motion for Immediate Judicial Review, as well as a motion for reconsideration of the October 8, 1981 Order of the Court denying a stay of the "Final Decision" of June 18, 1981, and the deferring of the filing of Respondent's brief.²⁵ On October 28, 1981, Mr. Rodriguez filed a motion for an order to the Department of Employment Services directing them to abstain from conducting further administrative hearings pending a decision regarding the challenge to their taking jurisdiction.

In all of his motions on the issue, as well as in extensive detail in his brief, Mr. Rodriguez refuted the District Government's argument that either Mayor Washington's

Reorganization Plan No. 1 of 1978 (eff. June, 1978, 25 D.C. Reg. 2889) or Mayor Barry's Reorganization Plan No. 1 of 1980 (eff. June 1980, 27 D.C. Reg. 2724) could legally abolish and then transfer the powers, duties, and functions of the District Unemployment Compensation Board to the Director, District Department of Employment Services.

Very simply, the Board had always been independent with primary responsibility for unemployment compensation.²⁶ This had been affirmed by the Court of Appeals and the City Council.²⁷

Consequently, Mr. Rodriguez argued both in writing and later in oral argument, that the District Government's contentions were pure sophistry. To argue that former Mayor Washington, and current Mayor Barry via a Mayor's Reorganization Plan issued in 1978 and 1980 respectively, could amend a statute of Congress which created the authority for the Board, and ignore a statute of Congress as to legislative authority of the Council, was not

only illogical but illegal. It was liken to the Mayor of Detroit, via a mayor's executive order transferring the authority to operate the Navy, to the Director of Public Works of Lake Michigan.

Beginning in early July, 1981, Mr. Rodriguez more vigorously continued to petition numerous Congressmen for an investigation of the District Government, in response the City Council began passing retroactive legislation in an attempt to provide a veil of authority to the Mayor's past actions and thus support the decision against Mr. Rodriguez.

On November 20, 1981, the District of Columbia Court of Appeals issued an order denying each and every one of Mr. Rodriguez's motions regarding the record, stay, and an immediate judicial review on the challenge to jurisdiction. No reason or holding was given for the denial. Furthermore, the court unilaterally permitted the District Department of Employment Services to file its brief on

December 21, 1981. The Government's brief had been due on November 4, 1981.

On December 21, 1981, the District's Department of Employment Services filed a motion to extend time for filing of their brief. Having received this motion on Christmas Eve, Mr. Rodriguez had to wait until December 28, 1981 to file his motion opposing the extending of time. Mr. Rodriguez opposed it on the grounds that the Government had been in total control of the record (and had repeatedly refused to supply any portion to Mr. Rodriguez), thus it was ludicrous for them now to use the extensiveness of it as a reason to not supply a brief in response to the one filed by Mr. Rodriguez more than eighty-one days earlier. In addition, Mr. Rodriguez noted that the Court of Appeals had already unilaterally granted the City Government an extra sixty-one days above his objection, which added to the thirty days provided for in Rule 31(2), gave the City Government ninety-one days to prepare and file their brief.

On January 5, 1982, Chief Judge Theodore R. Newman granted the District Government's motion to extend time and ordered that the brief be filed on January 22, 1982.

On January 22, 1982, the District's Department of Employment Services filed a motion for further extension of time in which to file its brief, the reason for the requested delay was "weather conditions." On January 26, 1982 Mr. Rodriguez filed a motion objecting to further extension of time for the City Government to file its brief on the grounds that this would further deprive Mr. Rodriguez of his right to a fair hearing and due process. On the same date Mr. Rodriguez filed a motion for dismissal due to lack of prosecution.

On February 1, 1982, Judge Catherine B. Kelly granted the City Government an extension of time to file its brief and denied Mr. Rodriguez his motion for dismissal. Thus, one hundred and three days after Mr. Rodriguez filed his brief on October 7, 1981, the City

Government filed its brief, on February 1, 1982, and a hearing was set for March 10, 1982.

It is worth noting that the Government's brief at page six, based the Mayor's power to reorganize the Unemployment Compensation Board out of existence, on the grounds that the, "[e]xercise of the Presidential reorganization power (on which the Mayoral (sic) power is based) has always included the power to abolish entities subject to executive control." Furthermore, the brief did not address any of the issues regarding budget, employment, or personnel. Finally, at page eleven, the D.C. Government stated,

The Appeals Examiner properly refused to issue subpoenas requested by [Mr. Rodriguez]. The subpoenas were sought to be directed to the Mayor of the District of Columbia, the City Administrator, the then Director of DOES, and a retired Director of the Office of Unemployment Compensation. The first three of these are public officials who are actively engaged in the performance of official duties which involve a substantial amount of time and are of far reaching consequence. The Appeals Examiner quite properly ruled that it is neither necessary nor reasonable to issue subpoenas to such officials in a

hearing on a claim for unemployment compensation.

On March 10, 1982, Mr. Rodriguez presented oral argument before a three member panel composed of Associate Judges Ferren, Pryor, and Belson. The two arguments that Mr. Rodriguez presented on the various issues were that he could not have been employed during the period in question with the OEA since it had not been authorized by the necessary Act of Congress and had no budget. In addition, no personnel action (Form 1) changing his status from volunteer to employee had been approved and signed by the authorized official as required by Comptroller General decisions which the District Government was required to follow.

During the oral argument of Ms. Grace L. Rosner, attorney for the District's Department of Employment Services, the Judges repeatedly turned to questions regarding Mr. Rodriguez's access to the record prior to the final agency decision.

On March 11, 1982, the City Government filed a motion for leave to file an affidavit. The purpose of said affidavit was to attest to the alleged fact that Mr. Rodriguez picked up copies of eight cassettes containing the lengthy hearing and that no other item was taken from the case file by him.

On March 17, 1982, D.C. Court of Appeals denied the Government's motion for leave to file an affidavit. But on March 18, 1982, the Court ordered the record remanded to the Department of Employment Services to determine whether Mr. Rodriguez's request of February 27, 1981, had been complied with. This was nine months after Mr. Rodriguez began filing motions regarding the record, all of which had been denied.

On April 7, 1982, Mr. Rodriguez filed a motion for reconsideration of the order of the Court dated March 18, 1982, and for a stay pending a judgment on the issue of jurisdiction of the Department of Employment Services to render a final decision for the

Unemployment Compensation Board. In his motion, Mr. Rodriguez noted that he had filed numerous motions regarding the record throughout 1981, and repeatedly raised the issue of non-receipt of the record, all these motions were denied by the Court. Furthermore, to remand back to an administrative agency whose jurisdiction has been repeatedly challenged and which is an issue before the Court was inappropriate.

On April 9, 1982, the Court denied Mr. Rodriguez's motion.

On April 12, 1982, hearing was conducted by Mr. Michael E. Bray, Hearing Officer, Office of Wage-Hour, Department of Employment Services. Mr. Rodriguez refused to attend on the grounds that Mr. Bray had no jurisdiction to hear an issue dealing with unemployment compensation.

On April 21, 1982, the Court of Appeals docketed the supplemental record prepared by Mr. Bray, and sought Mr. Rodriguez's comments to this new record.

On May 11, 1982, Mr. Rodriguez filed his comments which again challenged the jurisdiction of such a hearing, noted that he neither received official transcript nor documents, that he never received the required determination of a claims deputy with finding, as required, and that he received no record as required by the D.C. Code § 46-311(f) and § 46-313(f)(1973).

On August 5, 1982, the D.C. Court of Appeals issued its memorandum opinion and judgment (see Appendix A) affirming the final decision of the Acting Director of the District of Columbia Department of Employment Services which ordered Mr. Rodriguez disqualified from receiving unemployment compensation for a period of two years on the grounds that he committed fraud.

The Court disposed of the issue of overpayment, by stating that Mr. Rodriguez conceded the issue of overpayment in the hearing.²⁸

The Court first found that Mr. Rodriguez had received a copy of the record in accord with D.C. Code §1-1509(c).

The Court next found that Mr. Rodriguez committed fraud in violation of D.C. code §46-319(e). The Court ignored the requirement for the personnel action (Form 1). The Court based its decision on the Appointment Affidavit, saying that it was the document that made Mr. Rodriguez employed for compensation. This was in clear violation of Federal personnel law, which it was required to take judicial notice of.

Finally, the Court ignored all other issues by finding Mr. Rodriguez's arguments "unpersuasive" as to the issues that the Department is without jurisdiction to adjudicate unemployment claims; that the proceedings before the Department were not conducted in accordance with the due process requirements of the Fifth Amendment and the provisions of the District of Columbia Administrative Procedure Act; and that the Appeals

Examiner was not impartial, but subject to the control of unnamed "higher authorities."

VI

On August 18, 1982 a timely Petition for Rehearing En Banc was filed with the District of Columbia Court of Appeals on both errors of law and fact.

On October 5, 1982, the District of Columbia Court of Appeals denied the petition for rehearing en banc (Appendix B) and a timely notice of appeal to the Supreme Court of the United States was filed on October 18, 1982 with the Clerk of the Court of Appeals (Appendix C).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents a number of important questions, concerning the administration of this Nation's Capital, the District of Columbia, by the various units of city government delegated authority by Congress under the Reorganization Act.

The Reorganization Act, a federal law passed by Congress and approved by the President, delegated legislative power to the District government. In delegating, Congress complied with this Court's requirements that for a delegation to be valid, set standards and rules of conduct must be followed by city officials, thereby limiting their discretion. This case raises a number of substantial questions because numerous city officials have willfully violated these Congressionally mandated controls, and if their acts of noncompliance are allowed to stand, they would invalidate the Reorganization Act.

Consequently, the questions presented are distinguishable from the issue raised in Key v. Doyle, 434 U.S. 59, 54 L.Ed. 2d 238, 98 S. Ct. 280(1977), and fall into the exception which would permit the application of 28 U.S.C. §1257(1) for an appeal to the United States Supreme Court of a final judgment of the District of Columbia Court of Appeals.

In Key v. Doyle, supra, in footnote 14, at page 68, this Court held that a law applicable only in the District of Columbia is not a "statute of the United States," and thus, an appeal from a decision of the District of Columbia Court of Appeals would be dismissed for lack of jurisdiction. However, this Court noted that 28 U.S.C. §1257(1), would be applicable if the District of Columbia court of Appeals should invalidate a federal law other than a provision of the D.C. Code.

The Reorganization Act is such a federal law, for Congress having ultimate legislative authority over the Nation's Capital under Article I, Section 8, Clause 17, of the Constitution could only delegate certain legislative powers consistent with their constitutional authority. In order to satisfy this mandate and requirement established by this Court for the existence of a valid delegation of legislative power²⁹ to be present, Congress was very careful to incorporate in the Reorganization Act standards and

a legislative statement of policy sufficiently definite to prevent the exercise, upon the part of city officials of pure discretion. Section 102(a) and 302 of the Reorganization Act.

Congress stated very precisely that this Act of Congress was separate and distinct from an act of the City Council, Section 103(7) of the Reorganization Act. That the legislative powers delegated were to be administered consistent with the Constitution and the provisions of the Reorganization Act, and the Council had no authority to enact any act, or enact any act to amend, or repeal any Act of Congress which is not restricted in application exclusively to the District, Section 302 and 602(a)(3) of the Reorganization Act.

In further compliance with the requirements to be met for a valid delegation of legislative powers, Congress made the delegation very specific and restricted said legislative powers only to the City Council. It provided the Council the sole authority to

abolish an instrumentality of the government of the District, and restricted the Council to the enactment of "acts" in discharging its authority. Finally, said act had to be published in a newspaper upon becoming law. Section 404(a), (b), and 412(a) of the Reorganization Act.

With regard to the role of the new Mayor's position, as chief executive of the city government, Congress again met the standard required by this Court, by not permitting the executive power of the Mayor to be purely discretionary. First, it limited the Mayor's authority to that within the Reorganization Act. Second, Congress prescribed his power to one of administering as an executive, and in accord with all Acts of Congress, including personnel laws as they relate to appointment and separation. Third, it prohibited the Mayor from using administrative orders inconsistent with the Reorganization Act or other Act of Congress or any act of the Council. Fourth and finally, Congress limited the

Mayor's reorganization authority to one of the administorial: the Mayor could not abolish any instrumentality created by Congress or the Council, Section 422(2),(3),(11), and (12), Section 603(a) and 714(c) of the Reorganization Act.

With regard to budget and employment in the District Government, Congress expressly prohibited any officer or employee of the District from obligating or expending any amount of money unless it was approved by Congress, Section 446 of the Reorganization Act. Furthermore, Congress expressly required the Mayor to establish both budget and personnel control systems, and expressly prohibited the hiring of any full-time or part-time employee unless authorized by an Act of Congress, Section 447 of the Reorganization Act.

Turning to the facts in the case, it is clear that each and every provision cited above, which Congress expressly provided for in delegating legislative authority to both

the Council and the Mayor have been willfully and intentionally violated. First, despite the fact that Mr. Rodriguez and others stated repeatedly, and the facts in the record show, that he worked as a volunteer with the Office of Employee Appeal, pending an FY 80 Supplemental Request, the District Government continued to falsely make out a case that he was employed full time for compensation without the necessary authorization, in clear violation of Section 446 and 447 of the Reorganization Act. Second, despite Mr. Rodriguez pointing out that he could not have received compensation for his volunteer service with the Office of Employee Appeals, for they had not been authorized by Congress a budget or authority to spend, the District Government maintained that monies received during the period in question came from that Office and refused to permit examination of records, this in clear violation of 446 of the Reorganization Act. Third, despite Mr. Rodriguez argument that he could not have been

employed, since no valid personnel action (Form 1) had been authorized which would/could have changed him from a volunteer to an employee for compensation, the District Government falsely argued that an Appointment Affidavit (the oath of office) standing alone made a person an employee for compensation, this contrary to federal personnel law as established by Acts of Congress in violation of the requirements of Section 422(2) and (3), 603(a), and 714(c) of the Reorganization Act.

Consequently, because of these numerous willful violations of the standards within the Reorganization Act, which is a federal law enacted by Congress to provide for the delegation of some of its legislative powers to the District of Columbia Government, and because if these intentional acts of non-compliance are allowed to stand which would invalidate a statute of the United States organizing the District Government, questions are raised which are so substantial as to require plenary consideration by the United

States Supreme Court, with briefs on the merits and oral argument, for their resolution.

CONCLUSION

This Court has held that the central aim of the Constitution and Civil Rights Acts which emanate from it, are to provide protection to those persons wronged by the misuse of power, possessed by virtue of law and made possible only because the wrongdoer is clothed with authority of law. Consequently, in addition to a right of appeal under 28 U.S.C. §1257(1) as a result of non-compliance with an Act of Congress, this case involves substantial, willful, and malicious violations of Mr. Rodriguez's rights under the Constitution, and thus alternatively should be heard by this Court under 12 U.S.C. 1257(3).

These rights under the United States Constitution which have been violated by willful actions on the part of the Mayor and City Council (with knowledge and approval of members of the D.C. Court of Appeals, and some

members of Congress) include: First, the prohibition against ex post facto law under Article I, Section 10, which has been violated by the Mayor and Council in attempting to vest the Mayor and Director of the Department of Employment Services retroactively with authority to issue a final decision for the District Unemployment Compensation Board; Second, repeated actions violating Mr. Rodriguez's right to due process under the Fifth Amendment to the Constitution, these actions include, but are not limited to, the denial to any information or records during the administrative hearing process, the denial to the finding of fact of the claims deputy, the denial of the right to subpoena witnesses, and the total lack of an impartial hearing process which was not under the control of the Mayor; Third and finally, Mr. Rodriguez's right to petition Congress and to free speech secured by the First Amendment, were violated by the District Government each time he requested

that responsible members of Congress undertake an investigation of the City's mismanagement.

This Court cannot permit such actions in the Nation's Capital by government officials, acting as agents for Congress in its legislative capacity. The very role and accountability of District government under the Reorganization Act is at issue.

Mr. Rodriguez having attempted to set up a viable District merit personnel system, became the target of the District's Tammany Hall political system. Rather than to permit the Mayor and City Council to violate his rights as well as all individuals who have a vested interest in our Nation's Capital, Mr. Rodriguez has for over three years tenaciously fought alone, this extensive malfeasance of the District Government. This Court now has an opportunity to correct a massive wrong imposed not only on Mr. Rodriguez, but more importantly on every citizen of these United States who are adversely affected by the mismanagement of our Nation's Capital caused

by willful non-compliance with the Reorganization Act.

In closing, as the famous Black civil libertarian Mr. Frederick Douglass stated on August 4, 1857:

Those who profess to favor Freedom, and yet deprecate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightning. They want the ocean without the awful roar of its waters. This struggle may be a moral one; or it may be a physical one; or it may be both moral and physical; but it must be a struggle. Power concedes nothing without a demand. It never did, and it never will. Find out just what people will submit to, and you have found out the exact amount of injustice and wrong which will be imposed on them; and these will continue until they are resisted with either words or blows, or with both. The limit of tyrants are prescribed by the endurance of those whom they oppress.

For the aforementioned reasons, the Petitioner prays that this Court grant plenary

review of the decision of the District of
Columbia Court of Appeals.

Respectfully submitted,

Isidoro Rodriguez
Attorney at Law
604 S. View Terrace
Alexandria, Va. 22314
(703) 683-6545
Petitioner Pro Se

CERTIFICATE OF SERVICE

In accord with Rule 28.4(a) of the Supreme Court of the United States, I hereby certify that I have on _____ day of _____, 19____, hand delivered three copies of this jurisdic-
tional statement to:

The Solicitor General
Department of Justice
Washington, D.C. 20530

The Department of Employment Service
for the District of Columbia
Washington, D.C. 20008

The Clerk
District of Columbia Court of Appeals
Washington, D.C. 20004

Isidoro Rodriguez
604 S. View Terrace
Alexandria, Va. 22314
(703) 683-6545

FOOTNOTES

¹In this position Mr. Rodriguez's responsibilities were to develop and advise the Office of the Mayor, on the legal requirements that must be met in order to establish the District's independent personnel system in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, March 3, 1979, D.C. Code Supp. VII (herein after cited as Personnel Law).

²The closed advisory briefing was conducted by Mr. Rodriguez on November 30, 1979, with the purpose of briefing the Mayor on the status of the transition from the Federal Civil Service System to a separate District merit personnel system. At that time the Mayor was informed by Mr. Rodriguez that due to the failure of the District to budget properly for FY 80, there were a number of major problems which included the need to establish and fund the District's Disability Compensation for D.C. employees, the need to establish the Office of Employee Appeals (which was required if any adverse action or reductions-in-force were contemplated), and the need to correct the failure to comply with the City's Charter when the Mayor and City Council raised their salaries in violation of the amending procedures of Section 303(a) of the Reorganization Act.

³At the time Mr. Rodriguez was owed approximately \$7223.00 for overtime and \$41,703.60 on the remainder of his contract.

⁴In accord with Mr. Rodriguez's recommendation (see footnote 2, supra) the Mayor appointed members to this Office on December 20, 1979. The importance of this Office cannot be understated since the members serve as the District's counterpart to the Merit Systems Protection Board, thus it is a key element to the merit personnel system's protection of District employees' rights to due process in any personnel action.

⁵See Appendix D, Sections 446 and 447 of the Reorganization Act. In addition, OEA had to promulgate regulations 180 days after their appointment, in

order to become operational. See D.C. Code Section 1-366.1(1) and (1)(Supp. VII 1980) of the Personnel Law.

⁶ Ms. Banks testified on July 16, 1980, that when Mr. Rodriguez started to work for OEA, "he started working as a volunteer. He did not know when he would get on the payroll, or if he would be on a payroll. And my recollection is that he did not know for some time. So that the date of the 4th is when he started, but he started not knowing whether or not he would be paid,...(emphasis added) Transcript July 16, 1980 Tape One/page 33.

⁷ The Appointment Affidavit, as then required by the District Government, was designed to conform with the statutory requirements of 5 U.S.C. § 3333 and § 7311. It included only three items: first, an oath of office to support and defend the Constitution; second, and affidavit as to purchase of office; and third, an affidavit as to work history.

In accord with Section 422(3) of the Reorganization Act, the District government must comply with Federal law passed by Congress regarding appointments. Consequently, a contract or personnel action (Form 1) had to be created and approved causing an appointment (employment) for compensation to begin.

⁸ Under regulations and Unemployment Insurance Program Letters issued by the U.S. Department of Labor, Manpower Administration, which the District Government must follow in administering its unemployment compensation program, if Mr. Rodriguez did eventually get paid for volunteer service performed, he is simply required to repay that amount which related to benefits received. Furthermore, under District unemployment compensation law, doing volunteer work does not constitute being employed. D.C. Code § 46-301(e) (Supp. VII. 1980). Cumming v. District Unemployment Comp. Bd., 384 A. 2d 1010(D.C. 1978), where the Court found that an attorney on a contingent fee contract not employed.

⁹ Since late December, 1979, Mr. Rodriguez was physically barred from entering the premises of the Office

of Personnel. Apparently due to the fact that it was widely known that Mr. Rodriguez was continuing his preparation to sue the Mayor et. al., information relating to his past employment status was denied Mr. Rodriguez. This inability to obtain information from the government was raised throughout the hearing. Mr. Rodriguez submitted into evidence on December 2, 1980, Exhibit 22 entitled Current Obligation Budget Modification By Responsibility Center and Budget, of February 29, 1980, and March 1980, showing no allocation from the Office of Employee Appeals.

- 10 Mr. Rodriguez had recently prevented the Mayor from conducting a massive and illegal reduction-in-force in early 1980. Thus the need for the Mayor et. al. to get him out of OEA.
- 11 From the record, this "audit" was admittedly defective. Transcript of hearing of July 16, 1980, Tape One/page 4 and 5, testimony of Mr. James Matson that the notice was drafted not on findings of facts, but based on the order of the District Government and on the order of the Central Office Manager.
- 12 On December 2, 1980, Tape Seven/page 33 of the transcript of the hearing conducted by Hearing Examiner Weil, Mr. Matson testified that, "[a]fter that meeting, well then I went to the Central Office Manager questioning the Director's comment, saying how does he know that [Mr. Rodriguez] will be disqualified for that length of time...and the Central Office Manager informed me that [Mr. Rodriguez] would be disqualified." See also Tape One/page 4, of July 16, 1980.
- 13 Mr. Matson admitted that the normal process had not been followed. See transcript of hearing conducted by Hearing Examiner Weil of December 2, 1980 Tape Seven/page 31 and 34; and Tape Eight/pages 5 thru 9.
- 14 It was at this time that Mr. Rodriguez discovered that despite statutory mandate, the District Unemployment Compensation Board did not administer the unemployment compensation program, that in fact, there was no Board, and that the program was under the direct administrative control of the Mayor, via

the Director of the Department of Employment Services (prior to June 1980, the District Department of Labor).

- 15 Mr. Rodriguez appealed the issue of overpayment on the grounds that he was eligible for unemployment compensation prior to January 7, 1980 and that he was unemployed. He appealed the issue of earnings on the grounds that he was not employed with OEA, rather, he provided volunteer services.
- 16 The Claims Record Card UC-170, which contained Mr. Matson's hand written notes, stated that there was an overpayment, but concluded not to impose a disqualification based on "19(e)" since, "Mr. Rodriguez denied being employed; was not aware of being allegedly employed until after March 18, 1980, when he received a large sum of money; was denied information concerning his alleged employment when he sought to determine what the check related to; and the alleged employer was not specific as to the date of commencement of the alleged employment or the amount of weekly earnings." See Tab X-3 of the Record on file with the Court of Appeals.
- 17 As one of the grounds for appealing the audit letters, Mr. Rodriguez alleged serious violation of sections of the District Unemployment Compensation Act, including, but not limited to, the breach of confidentiality, willful falsification and manipulation of personnel documents (specifically Personnel Action Form 1 and Appointment Affidavit), and the willful and malicious withholding of information from the petitioner despite repeated requests from February, 1980 thru April, 1980 (and to the present). D.C. Code 46-313(f), 46-317(a) and (b), 46-319(b) (1973).
- 18 Note footnote 15. Also part one of Brief of Claimant-Appellee of December 12, 1980, Appeal No. 47,908-UI, filed with the Appeals Section of the District Department of Labor.
- 19 Testimony of Ms. Sharron Banks, Chairperson OEA, Transcript July 16, 1980, Tape One/page 30 and 32; Tape Two/page 2, 5, and 26.

- ²⁰ Closing Argument of Mr. Rodriguez, Transcript of December 2, 1980, Tape Seven/page 10 and 11.
- ²¹ Reorganization Act, Section 422 (3) and Section 714(c), also see 5 U.S.C. § 1301 and § 1302; 5 C.F.R. § 5.4(e).
- ²² In the Spring of 1980, after receiving repeated physical threats, as well as continued violation of his rights, Mr. Rodriguez filed a complaint with the City Council alleging coercion, harassment, and retaliatory actions on the part of Mayor Marion Barry; his Special Assistant, Ivanhoe Donaldson; the City Administrator, Elija Baby Rogers; and the Acting Director of the Office of Personnel, Jose Gutierrez. In addition, Mr. Rodriguez began petitioning the various committees of the House and Senate with jurisdiction over the District, for an investigation of the Barry Administration and the numerous violations of its delegation from Congress. Note letter to Chairman Arrington Dixon of D.C. Council and attached complaint dated June 12, 1980. Tab W3 of the Record on file with the Court of Appeals.
- ²³ Earlier during the hearing, Mr. Ivanhoe Donaldson, testified that the Barry Administration had to submit a supplemental budget request of \$3,500,000 for FY 81. Note footnote 2, supra. Up to this point despite continued efforts by Mr. Rodriguez no District Disability Compensation Program had been established.
- ²⁴ This motion was based on D.C. Code §1-1510 (Supp.V, 1978) on the grounds that the Mayor had no authority by a Mayor's Reorganization Order to amend an act of Congress, as well as a recent amendment passed by the Counsel and approved by the U.S. Congress regarding the administrative and appeal authority of the Unemployment Compensation Board. It is worth noting that on July 29, 1981, the Mayor transmitted to Congress for a 30-day review D.C. Law 4-42 which among other things re-defined "reorganization" so to include the power of the Mayor to abolish agencies. This retroactive attempt to vest the Mayor with power which he previously did not have, effectively amended Sections 422(11) and (12) of the Reorganization Act,

in violation of Congress's mandate regarding the use of a set Charter amending procedure of Section 303(a) of the Reorganization Act and the general prohibition on retroactive legislation.

²⁵ See Townsend v. Swank, 404 U.S. 282(1971); California Dept. of Human Resources Dev. v. Java, 402 U.S. 121(1971); Rosado v. Wyman, 397 U.S. 397(1970), as to the requirement of due process in unemployment compensation proceedings. See A Guide to Unemployment Insurance Benefit Appeals, Principles and Procedures, U.S. Dept. of Labor, Manpower Administration(1970).

²⁶ See Report of the Commission on the Organization of the Government of the District of Columbia, Vol. II, H.R. Doc. No. 92-317, 92d Congress, 2nd Session (1972), pages 284 thru 287.

²⁷ In Cummings v. District Unemployment Comp. Bd., 382 A. 2d. 1010 at 1013, the District Court of Appeals stated in dicta, "We are cognizant of the fact that by its delegation of administrative authority to the Board, D.C. Code 1973, § 46-313, Congress has constituted that body as the primary interpreters of the Act...See Brooks v. NLRB, 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed. 125(1954)." On January 1, 1980, amendments to Section 46-313(a) and (b)(Supp. VII, 1980), of the District Unemployment Compensation Act became effective, and they maintained and reaffirmed the Board's plenary role.

²⁸ As noted earlier, Mr. Rodriguez raised two issues regarding alleged overpayment, first he had not been overpaid benefits since he was eligible for compensation prior to January 7, 1980; second, he was not in an overpayment situation since he was not employed during the period in question (see footnote 15 and 18).

²⁹ This Court has repeatedly held that although a delegation of legislative power is permitted, Congress must set standards and rules of conduct to be followed. In short, the delegation cannot be too broad a declaration, leaving Congress's agent too much room for discretion. See Panama Refining Co. v.

Ryan, 293 U.S. 388; 55 S. Ct. 241; 79 L. Ed. 446
(1935); A. L. A. Schechter Corp. v. United States,
295 U.S. 495, 55 S. Ct. 837; 79 L. Ed. 1570(1935).

A-1

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-900

ISIDORO RODRIGUEZ, Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF
EMPLOYMENT SERVICES, Respondent.

Petition for Review of Decision of the
District of Columbia Department
of Employment Services

(Argued March 10, 1982

Decided August, 5, 1982)

BEFORE: FERREN, PRYOR, and BELSON, Associate
Judges.

MEMORANDUM OPINION AND JUDGMENT

Petitioner seeks review of a final Decision of the Acting Director of the District of Columbia Department of Employment Services (the Department) ordering that petitioner be disqualified from receiving unemployment compensation benefits for a period of two years on the ground that petitioner committed fraud in representing his employment status to the Department.¹ We affirm.

In his petition for review, petitioner alleged that his request to the Department for record material necessary to prepare his

appeal of the Appeals Examiner's decision to the Acting Director was not complied with by the agency in accordance with D.C. Code 1973, § 1-1509 (c).² We found that the record before us was insufficient to permit a determination of whether the Department had complied with petitioner's request. Accordingly, we ordered the record remanded to the Department in order that evidence might be taken and a finding made as to whether the Department had "reasonably and adequately" complied with petitioner's request for record material.³

Pursuant to the order, the Department took evidence, including the sworn testimony of Department employees that petitioner's requests for record material had been complied with in accordance with the provisions of § 1-1509(c). Petitioner offered no evidence in support of his contention that he had been denied the material, and voluntarily absented himself from the hearing at which testimony was taken.

The Acting Director's Finding, issued pursuant to this court's order, was that petitioner's request for record material was reasonably and adequately complied with. We conclude that the record evidence supports the Acting Director's finding on this issue. We further conclude that there is substantial record evidence to support a finding that petitioner committed fraud upon the Department, and affirm the disqualification imposed by the Acting Director pursuant to D.C. Code 1973, § 46-319(e).⁴

Petitioner is an attorney who specializes in personnel and unemployment compensation law. He was employed by the District of Columbia Government, Office of Personnel, as an "Expert Consultant/Legal Counsel" from April, 1979 to December, 1979. On January 7, 1980, petitioner filed for unemployment compensation benefits. He claimed benefits for the calendar weeks ending February 9, through March 22, and benefits were paid to him for all seven weeks. In accordance with

Department regulations, petitioner certified that he was not employed during each of the weeks for which he claimed benefits.

On February 4, 1980, petitioner began performing services for the Department of Employment Services, Office of Employee Appeals. On that date the Office was in an organizational stage and funding for it had not been approved. The Chairperson of the Office of Employee appeals testified in hearings before the Department that petitioner started working for that office as a volunteer and that petitioner did not know "for some time" if or when he would get on the payroll.

On February 20, 1980, petitioner signed a notarized appointment affidavit on which the date of his appointment to a position with the Office of Employee Appeals was designated as February 4, 1980. The record is not clear as to when petitioner first received payment for his services, but petitioner conceded that as of March 18, 1980, he had received a pay stub

indicating that he was being paid as an employee of the Office of Employee Appeals.

In accordance with Department procedure, petitioner's employer, the District of Columbia Office of Personnel, was notified that petitioner was claiming benefits. On April 1, 1980, a memorandum was addressed to the Department by the employer requesting a review of petitioner's eligibility for benefits and seeking the imposition of a disqualification for fraud. On the same date, petitioner informed the Department of a possible overpayment and submitted a check in the amount of \$1,000 to be applied thereon pending determination of overpayment by the Department.

A Claims Deputy found that there had been overpayment in the amount of \$1,267 in that petitioner received benefits while employed. The Deputy declined to impose a disqualification for fraud pursuant to section 46-319(e) after concluding that petitioner did not misrepresent willfully his employment status while claiming benefits. The Claims Deputy

based his conclusion in part on his own belief that "a person knowledgeable of the laws [would not] jeopardize [not only] his employment and profession but his future as a lawyer to obtain an extra \$181 per week illegally, when his annual average income is presently over \$40,000.

Petitioner appealed the determination of overpayment and the District of Columbia appealed the determination of no disqualification for fraud. Hearings were held before the Appeals Examiner between July and December, 1980. On February 20, 1981, the Appeals Examiner issued his decision that the prior determinations of overpayment and no fraud be affirmed. The Appeals Examiner noted his reliance upon the opinion of the Claims Deputy with respect to the fraud issue. Petitioner and the District of Columbia appealed the Appeals Examiner's decision to the Acting Director of the Department. On July 17, 1981, the Acting Director issued a Final Decision affirming the Appeals Examiner on the issue of

overpayment but reversing on the issue of fraud. The Acting Director concluded that application of the subjective test set forth in Jacobs v. District Unemployment Compensation Board, D.C.App., 382 A.2d 282 (1978) to the facts of the instant case compelled a determination that petitioner knowingly misrepresented his employment status and committed fraud upon the Department. We sustain that conclusion.

We have held that the elements of a section 46-319(e) violation essentially track the common law requirements for proof of fraud, those elements being, false representation of a material fact or failure to disclose a material fact, knowledge of the falsity, intention to induce reliance upon the misrepresentation, and actual reliance. Id at 286. Whether a claimant has knowledge of the falsity at issue is to be determined by reference to a subjective standard, i.e., the state of mind of the claimant rather than that of a reasonable person in the position of the

claimant is to be considered. Id. at 287. The Appeals Examiner's reference to the Claims Deputy's opinion concerning the motives of an individual in petitioner's position indicates that the Appeals Examiner incorrectly applied a reasonable' person test, rather than the subjective test mandated by Jacobs.

In addition, there is sufficient record evidence to sustain the Acting Director's finding that petitioner knowingly made false statements concerning his employment status. The Acting Director noted that appellant was an attorney experienced in personnel matters and familiar with all District of Columbia unemployment compensation procedures. In other words, he is presumed to be aware of the legal requirement in this jurisdiction that to be eligible for compensation under the District of Columbia Unemployment Compensation Act, an individual must not have performed any services or received any earnings during the period benefits are claimed. Dyer v. District of Columbia Unemployment Compensation Board,

D.C.App., 392 A.2d 1, 3 (1978). He is also presumed to be aware of the statutory definition of "earnings" as "all remuneration payable for personal services." D.C. Code 1973, § 46-301(d) [emphasis added]. Petitioner signed an appointment affidavit on February 20, 1980, indicating that his appointment was effective February 4, 1980. He thus is chargeable as of February 20, with knowledge that he was employed and had earnings due him beginning February 4, 1980. Moreover, at the latest by March 18, 1980, petitioner received a pay stub indicating he was being paid as an employee of the Office of Employee Appeals. Nevertheless, petitioner certified that he was unemployed through the period ending March 22, 1980 and accepted benefits for that period.

Petitioner's explanation that he believed payments he received in March, 1980 were in payment of a claim against his former employer, the Office of Personnel, reasonably could have been found unconvincing in light of

the complete lack of evidence that petitioner was ever notified that the claim was settled or that he was receiving payment on the claim.

In addition to alleging that there is insufficient record evidence to support the Acting Director's finding of fraud, petitioner asserts that the Department is without jurisdiction to adjudicate unemployment compensation claims; that proceedings before the Department were not conducted in accordance with the due process requirements of the Fifth Amendment and the provisions of the District of Columbia Administrative Procedure Act; and that the Appeals Examiner was not impartial, but was subject to the control of unnamed "higher authorities." We find these arguments unpersuasive. Accordingly, it is

ORDERED and ADJUDGED that the Final Decision of the District of Columbia Depart-

ment of Employment Services be, and it hereby is, affirmed.

FOR THE COURT

RICHARD B. HOFFMAN
Acting Clerk of the
Court

FOOTNOTES:

- ¹The Acting Director's Final Decision also affirmed the Appeals Examiner's finding that petitioner had been overpaid by the Department in that he received benefits while employed. Although petitioner seeks review of the Acting Director's determinations with respect to both overpayment and fraud, the record indicates that petitioner conceded overpayment in a hearing before the agency. We consider therefore that the overpayment issue is not before us.
- ²D.C. Code 1973, § 1-1509(c) provides that the agency shall maintain an official record in each contested case. Record material must be made available to parties to the case upon request. See Quick v. Department of Motor Vehicles, D.C.App., 311 A.2d 319 (1975).
- ³Order dated March 10, 1982.
- ⁴D.C. Code 1973, § 46-319(e) provides:

Any person who the Board finds has made a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this chapter may be disqualified for benefits for all or part of the remainder of such benefit year and for a period of not more than one year commencing with the end of such benefit year...

B-1

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 81-900

October 5, 1982

ISIDORO RODRIGUEZ,

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT
SERVICES

Respondent,

BEFORE: Newman, Chief Judge; Kelly, Kern,
Nebeker, Mack, Ferren, Pryor, Belson, and
Terry, Associate Judges.

O R D E R

On consideration of petitioner's petition
for rehearing en banc, and it appearing that
no judge of this court has called for a vote
thereon, it is

ORDERED that petitioner's petition is
denied.

PER CURIAM

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

ISIDORO RODRIGUEZ,
Petitioner,

v.

File No. 81-900

DISTRICT OF
COLUMBIA DEPART-
MENT OF EMPLOYMENT
SERVICES,
Respondent

Filed October 18,
1982

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Petitioner Isidoro Rodriguez, hereby appeal's to the Supreme Court of the United States the entire judgment and decision of the District of Columbia Court of Appeals in the above case decided August 5, 1982, and as to which a Petition for Rehearing En Banc was denied on October 5, 1982.

This appeal is taken pursuant to 28 USC § 1257(1).

ISIDORO RODRIGUEZ,
PETITIONER

PROOF OF SERVICE

This is to certify that on the 18 day of October, 1982, I personally served this Notice of Appeal to the Supreme Court of the United States upon Ms. Grace L. Rosner, General Counsel, District of Columbia Department of Employment Services, 500 C Street, Room 603, Washington, D.C. 20001.

ISIDORO RODRIGUEZ,
PETITIONER

District of Columbia, ss:

Subscribed and sworn to before me, Angela C. Granger, a Notary Public on 18 October 1982.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

Article I, Section 8, Clause 17, United States Constitution:

The Congress shall have Power...To exercise exclusive Legislation in all Cases whatsoever, over such District...as may, become the Seat of the Government of the United States,....

Article I, Section 10, United States Constitution:

No State shall...pass any...ex post facto law,....

First Amendment, United States Constitution:

Congress shall make no law respecting...;or the right of the people...to petition the Government for a redress of grievances.

Fifth Amendment, United States Constitution:

No person...shall be deprived of life, liberty, or property without due process of law;....

District of Columbia Self-Government and Government Reorganization Act, Pub. L. No. 93-198, 87 STAT. 774(1973)

TITLE I
SHORT TITLE, PURPOSE, AND DEFINITIONS

SHORT TITLE

Section 101 at 87 STAT. 776, provides:

This Act may be cited as the "District of Columbia Self-Government and Government Reorganization Act".

STATEMENT OF PURPOSE

Section 102(a) at 87 STAT. 777, provides:

Subject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia;...; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

DEFINITIONS

Section 103 at 87 STAT. 777, provides:

For the purpose of this Act...

(7) The term "act" includes any legislation passed by the Council, except where the term "Act" is used to refer to this Act of other Acts of Congress herein specified.

(12) The term "publish" and "publication", unless otherwise specifically provided herein, mean publication in a newspaper of general circulation in the District.

(15) The term "budget" means the entire request for appropriations and loan or spending authority for all activities of all agencies of the district financed from all existing or proposed resources and shall include both operating and capital expenditures.

TITLE III
DISTRICT CHARTER PREAMBLE, LEGISLATIVE
POWER, AND CHARTER AMENDING PROCEDURE

LEGISLATIVE POWER

Section 302 at 87 STAT. 784, provides:

Except as provided in section 601, 602, and 603, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and provisions of this Act....

CHARTER AMENDING PROCEDURE

Section 303, (a) at 87 STAT. 784, provides:

The charter set forth in title IV (including any provision of law amended by such title), except sections 401(a) and 421(a), and part C of such title, may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification...

TITLE IV--THE DISTRICT CHARTER

Part A--The Council

Subpart 1-- Creation of the Council

POWERS OF THE COUNCIL

Section 404 at 87 STAT. 787, provides:

(a) Subject to the limitations specified in title VI of this Act, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act...

(b) The Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality.

(d) Every act shall be published and codified upon becoming law as the Council may direct.

Subpart 2--Organization and
Procedure of the Council

ACTS, RESOLUTIONS,
AND REQUIREMENTS FOR QUORUM

Section 412(a) at 87 STAT. 788, provides:

The Council, to discharge the powers and duties imposed herein, shall pass acts.... The Council shall use acts for all legislative purposes.... Each proposed act shall be read twice in substantially the same form.... Resolutions shall be used to express simple determinations, decisions, or directives of the Council of a special or temporary character.

Part B--THE MAYOR
POWERS AND DUTIES

Section 422 at 87 STAT. 790, provides:

The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District government. In addition, except as otherwise provided in this Act, all functions granted to or vested in the Commissioner of the District of Columbia, as established under Reorganization Plan Number 3 of 1967, shall be carried out by the Mayor in accordance with this Act. The mayor shall be responsible for the

proper administration of the affairs of the District coming under his jurisdiction or control, including but not limited to the following powers, duties, and functions:

(2) The Mayor shall administer all laws relating to the appointment, promotion, discipline, separation, and other conditions of employment of personnel in the office of the Mayor, personnel in executive departments of the District, and members of boards, commissions, and other agencies, who, under laws in effect on the date immediately preceding the effective date of section 711(a) of this Act, were subject to appointment and removal by the Commissioner of the District of Columbia. All actions affecting such personnel and such members shall until such time as legislation is enacted by the Council superseding such laws and establishing a permanent District government merit system, pursuant to paragraph (3), continue to be subject to the provisions of Acts of Congress relating to the appointment, promotion, discipline, separation, and other conditions of employment applicable to officers and employees of the District government,....

(3) The Mayor shall administer the personnel functions of the District covering employees of all District departments, boards, commissions, offices and agencies, except as otherwise provided by this Act. Personnel legislation enacted by Congress prior to or after the effective date of this section, including, without limitation, legislation relating to appointments, promotions, discipline, separation, pay, unemployment compensation,...applicable to employees of the District government..., shall continue to be applicable until such time as the Council shall pursuant to this section provide, for

coverage under a District government merit system.

(11) The Mayor is authorized to issue and enforce administrative orders, not inconsistent with this or any other Act of the Congress or any act of the Council, as are necessary to carry out his functions and duties.

(12) The Mayor may reorganize the offices, agencies, and other entities within the executive branch of the government of the District by submitting to the Council a detailed plan of such reorganization. Such a reorganization plan shall be valid only if the Council does not adopt..., a resolution disapproving such reorganization.

PART D--DISTRICT BUDGET AND FINANCIAL MANAGEMENT

Subpart 1--Budget and Financial Management

ENACTMENT OF APPROPRIATIONS BY CONGRESS

Section 446 at 87 STAT. 801, provides:

....No amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act....

CONSISTENCY OF BUDGET, ACCOUNTING, AND PERSONNEL SYSTEMS

Section 447 at 87 STAT. 801, provides:

The Mayor shall implement appropriate procedures to insure that budget, accounting, and personnel control systems and structures are synchronized for budget and control purposes on a continuing basis. No employee shall be hired on a

full-time or part-time basis unless such position is authorized by Act of Congress. Employees shall be assigned in accordance with the program, organization, and fund categories specified in the Act of Congress authorizing such position. Hiring of temporary employees and temporary employee transfers among programs shall be consistent with applicable Acts of Congress and reprogramming procedures to insure that costs are accurately associated with programs and sources of funding.

TITLE VI--RESERVATION OF CONGRESSIONAL AUTHORITY

LIMITATIONS ON THE COUNCIL

Section 602(a)(3) at 87 STAT. 813, provides:

The Council shall have no authority to pass any act contrary to the provisions of this act Except as specifically provided in this Act, or to...(3) enact any act, or enact any act to amend or repeal any Act of Congress,...which is not restricted in its application exclusively in or to the District;....

BUDGET PROCESS;--

Section 603(a) at 87 STAT. 814, provides:

Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

**TITLE VII--REFERENDUM;
SUCCESSION IN GOVERNMENT;
TEMPORARY PROVISIONS; MISCELLANEOUS;
AMENDMENTS TO DISTRICT OF COLUMBIA
ELECTION ACT;
RULES OF CONSTRUCTION; AND EFFECTIVE DATES**

Part B--Succession in Government

**ABOLISHMENT OF EXISTING GOVERNMENT
AND TRANSFER OF FUNCTION**

Section 711 at 87 STAT. 818, provides:

The District of Columbia Council,...and the office of the Commissioner of the District of Columbia..., as established by Reorganization Plan Numbered 3 of 1967 are abolished as of noon January 2, 1975....

**CERTAIN DELEGATED FUNCTIONS AND FUNCTIONS
OF CERTAIN AGENCIES**

Section 712(c) at 87 STAT. 819, provides:

No function of the District of Columbia Council (established under Reorganization Plan Number 3 of 1967) or of the Commissioner of the District of Columbia which such District of Columbia or Commissioner has delegated to an officer, employee, or agency (including any body of or under such agency)...shall be considered as a function transferred to the Council pursuant to section 404(a) of this Act. Each such function is hereby transferred to the officer, employee, or agency (including any body of or under such agency), to whom or to which it was delegated, or in whom or in which it has remained vested, until the Mayor or Council established under this Act, or both, pursuant to the powers herein granted, shall revoke, modify, or transfer such delegation or vesting.

EXISTING STATUTES, REGULATIONS
AND OTHER ACTIONS

Section 714(c) at 87 STAT. 819, provides:

Unless otherwise specifically provided in this Act, nothing contained in this Act shall be construed as affecting the applicability to the District government of personnel legislation relating to the District government until such time as the Council may otherwise elect to provide equal or equivalent coverage.

Part G--Effective Dates

Section 771 at 87 STAT. 836, provides:

(a) Titles I...shall take effect on the date of enactment of this Act. (December 24, 1973)

(c) Titles III and IV shall take effect January 2, 1975, if title IV is accepted by a majority of the registered qualified electors in the District of Columbia voting on the charter issue in the charter referendum. (Certification of results (approval) of charter referendum published 21 D.C. Register 651, October 15, 1974)

(d) Title VI and parts B,...of title VII shall take effect if and upon the date title IV becomes effective.

No. 82-1098

Office-Supreme Court, U.S.

FILED

FEB 11 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ISIDORO RODRIGUEZ,

Appellant,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES (DOES),
Appellee.

**On Appeal From The
District Of Columbia Court Of Appeals**

**MOTION OF APPELLEE
TO DISMISS OR TO AFFIRM**

JUDITH W. ROGERS
Corporation Counsel, D.C.

CHARLES L. REISHCHEL
Deputy Corporation
Counsel, D.C.

GRACE LOCKETT ROSNER
General Counsel, DOES
*Counsel of Record
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Room 603
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Washington, D.C. 20001
202-639-1319

QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction under 28 U.S.C. Section 1257(1) to hear an appeal from a judgment of the District of Columbia Court of Appeals which affirmed a final decision of the Acting Director of the District of Columbia Department of Employment Services (DOES) ordering that Appellant be disqualified from receiving unemployment compensation benefits on the ground that Appellant committed fraud in representing his employment status to DOES?

2. Whether a writ of certiorari should be granted under 28 U.S.C. Section 1257(3) to review such decision?

3. Whether the District of Columbia Court of Appeals erred in its final judgment?

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MOTION TO DISMISS OR TO AFFIRM
SUMMARY OF ARGUMENT

Appellee, through Counsel, hereby Moves
the Honorable Court to Dismiss this
Appeal or to Affirm the Judgment below;
and as cause states as follows:

- I. This appeal must be dismissed
for lack of jurisdiction;
- II. No writ of certiorari should
be granted; and
- III. The final judgment of the Court
below was correct and should
be affirmed.

Appellee's position is further developed
in the following Brief in Support of
Appellee's Motion to Dismiss or to
Affirm.

COUNTERSTATEMENT OF THE FACTS

Appellant has appealed from an order of the District of Columbia Court of Appeals which affirmed an administrative ruling made by the Acting Director of the District of Columbia Department of Employment Services (DOES) that he would be disqualified from receiving unemployment insurance benefits because of fraud.^{1/} The facts relevant to the final administrative action follow.

1/ The applicable law provides:

Any person who the Board finds has made a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this act may be disqualified for benefits for

On January 7, 1980, Appellant Isidoro Rodriguez (hereinafter the "claimant") filed a claim for unemployment benefits with DOES. He claimed benefits based on his previous employment from April through December, 1979 with the D.C. Office of Personnel (hereinafter the "employer").

On January 23, 1980, an initial determination was made finding claimant eligible for benefits of \$181.00 per

1/ continued from preceding page

all or part of the remainder of such benefit year and for a period of not more than one year commencing with the end of such benefit year.... Section 19(e) of the District of Columbia Unemployment Compensation Act, 49 Stat. 956; D.C. Code 1981, sec. 46-120(e)(1).

week. Thereafter, claimant received benefits for weeks ending January 19 through March 22, 1980.

For each week for which benefits were paid, claimant certified that he was not employed and had no earnings payable.^{2/}

2/ The form contains a section headed "Claimant's Certification of Eligibility for Benefit Payments" and contains, inter alia, the following statement:

I register for work and claim waiting week credit or unemployment benefits in accordance with the provisions of the District of Columbia Unemployment Compensation Act for each calendar week for which I sign below, and certify with respect to such week, that ...during each such week...I was not engaged in full time employment and that my total earnings from all sources were as reported for each week for which I sign.***I am aware that the law imposes penalties for making any false statements in connection with this claim. (Emphasis in original. See Tab X-3 of the administrative record filed with the Court below.)

While continuing to collect unemployment benefits, claimant began to perform services on February 4, 1980 as an Expert Consultant at the rate of \$157.00 per day. This work was performed pursuant to an agreement with the Chairperson of the D.C. Office of Employee Appeals (OEA). These arrangements were evidenced by several documents: a notarized appointment affidavit signed and dated by the claimant showing (in claimant's handwriting) an entry on duty date of February 4, 1980; a letter to "confirm the arrangements agreed to by telephone" from the Chairperson of OEA to the City Administrator dated February 7, 1980; a letter of acknowledgement from the City Administrator to the Chairperson of OEA dated February 8, 1980; and a D.C. Government Personnel Action (Form 1),

approved February 20, 1980, showing an effective date of February 4, 1980.

According to claimant, he actually received earnings for the services performed for OEA on or about March 18. Claimant did not disclose the fact of his employment or his receipt of earnings to DOES.

On April 1, 1980, correspondence was addressed from the employer to DOES requesting a review of claimant's continuing eligibility for benefits and seeking the imposition of a disqualification for fraud pursuant to Section 19(e) of the District of Columbia Unemployment Compensation Act; D.C. Code 1981, sec. 46-120(e) (hereinafter the "Unemployment Compensation Act").^{3/}

^{3/} See footnote 1 above at pages 2-3 which quotes the applicable law.

On April 3, 1980, a DOES Claims Examiner determined that claimant was overpaid \$1,267 because he was not unemployed as of February 4, 1980.^{4/}

According to claimant, this document was hand delivered to claimant on April 4, 1980 when claimant met with the then Director of the DOES Office of Unemployment Compensation. At the same time "in order to foreclose the appearance of impropriaty (sic)" claimant repaid \$1,000 and delivered a letter from himself to the then Director dated April 1.

4/ The term "unemployed" is defined in the Unemployment Compensation Act as follows:

An individual shall be deemed 'unemployed' with respect to any week during which he performs no services and with respect to which no earnings are payable to him....Section 1(e) of the Unemployment Compensation Act; D.C. Code 1981, sec. 46-101(e).

On April 18, 1980, an amended determination was made by a DOES Claims Examiner indicating that the reason for the overpayment was unreported earnings. This document was mailed to claimant, and claimant made written response on April 23 and April 28.

On April 29, 1980 imposition of a disqualification pursuant to Section 19(e) of the Unemployment Compensation Act was considered by a DOES Claims Examiner. The April 1 correspondence from the employer was reviewed as well as the written communications from the claimant. The Claim Record Card was annotated by the Claims Examiner as follows:

After carefully considering the facts as stated, the claimant is given the benefit of the

doubt because this examiner cannot fathom the motive of a person knowledgeable of laws to not only jeopardize his employment and profession but his future as a lawyer to obtain an extra \$181.00 per week, illegally, when his annual average income is presently over \$40,000.00.
Decision on fraud: Section 19(e) of the Act is not imposed.

The employer appealed the decision not to impose the Section 19(e) disqualification. The claimant appealed the determination that he was overpaid.^{5/}

5/ This issue was waived by the claimant prior to the final decision and is not before this Court.

Hearings were held by a DOES Hearing Examiner on both appeals on July 16, October 19, November 18, and December 2, 1980. The Hearing Examiner issued a decision on February 20, 1981 affirming the prior determination and stating, inter alia:

While some of the claimant's oral and written evidence (including his hearing demeanor and credibility) raises substantial questions of his innocent "subjective understanding" of the statutory language, he is given the benefit of the doubt....

Both parties timely appealed the decision of the Hearing Examiner to the Acting Director of DOES. On June 18, 1981,

after careful review of the entire record, the Acting Director of DOES issued proposed findings and decision affirming in part (on the overpayment issue) and reversing in part (on the fraud issue). Claimant filed written objections to the proposed findings.

On July 7, 1981, the Acting Director issued the final decision of DOES. He upheld the Hearing Examiner on the finding of an overpayment and reversed the Hearing Examiner on the issue of fraud. Claimant was disqualified from receiving benefits through December 26, 1981.^{6/}

^{6/} See footnote 1 at pages 2-3 above which quotes the applicable law.

On July 22, 1981, claimant timely filed a Petition for Review of the final agency decision with the District of Columbia Court of Appeals. After briefing and oral argument, the record was remanded to determine whether DOES had reasonably and adequately complied with claimant's requests for access to the administrative record.

On remand, claimant voluntarily absented himself from the hearing at which evidence was taken. After taking evidence, a DOES Hearing Examiner made findings which were certified to the District of Columbia Court of Appeals.

Thereafter, on August 5, 1982 the District of Columbia Court of Appeals affirmed the Acting Director's final

decision imposing a disqualification for fraud. Rodriguez v. District of Columbia, Dept. of Employment Services, D.C. App., 452 A.2d 1170 (1982). (The slip opinion is attached as an Appendix.) The District of Columbia Court of Appeals held:

(a) That there is substantial evidence in the record to support the final agency action;

(b) That claimant's "... explanation...[of how the misrepresentation occurred] reasonably could have been found unconvincing in light of the complete lack of evidence..." to support it;

(c) That claimant's argument regarding the jurisdiction of the agency to adjudicate unemployment

compensation claims is unpersuasive;
and

(d) That claimant's Fifth
Amendment due process arguments
regarding the agency proceedings are
unpersuasive.

It is from these holdings below that
Isidoro Rodriguez now asserts the right
to appeal pursuant to 28 U.S.C. Section
1257(1).

ARGUMENT

I. THIS APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION

Appellant challenges a ruling of the District of Columbia Court of Appeals affirming an order by the Acting Director of the District of Columbia Department of Employment Services (DOES) disqualifying appellant from receiving unemployment compensation benefits on the grounds that Appellant fraudulently misrepresented that he was unemployed when, in fact, he was employed; that is, he had earnings payable for services performed.

Appellant asserts that the ruling of the District of Columbia Court of Appeals condones a number of actions which are allegedly inconsistent with the

District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 744 (1973), (hereinafter the "Self-Government Act"); codified at various sections of the D.C. Code 1981, but principally at sec. 1-201 et seq. The Self-Government Act is the statute by which Congress established the present form of government for the District of Columbia and delegated to it the authority to govern its local affairs. Appellant asserts that the District of Columbia Court of Appeals has rendered a decision against the validity of a statute of the United States and that he has a right to appeal to this Court under 28 U.S.C. Section 1257(1). There is no merit to these assertions.

Appellant's argument rests on two premises: that the Self-Government Act is a "statute of the United States" for purposes of Section 1257(1); and that the Court below, by giving effect to conduct allegedly in violation of the Self-Government Act has rendered a "decision against its validity" within the meaning of that provision. Neither premise is well founded.

As appellant recongnizes (Jur. Statement at 42-43), Key v. Doyle, 434 U.S. 59 (1977), governs the first of these contentions. It holds that "no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application." 434 U.S. 59 at 68 (footnote omitted). As its very title suggests,

the District of Columbia Self-Government and Governmental Reorganization Act applies exclusively to the District of Columbia.^{7/} Therefore, it is clear that the Self-Government Act is not a "statute of the United States" within the meaning of Section 1257(1).

However, even if the Self-Government Act were such a statute, there has been no "decision against its validity" under Section 1257(1). Appellant asserts that various actions by District of Columbia officials were inconsistent

^{7/} Furthermore, there is no question that because the Self-Government Act is exclusively concerned with the establishment of local government and the definition of its authority, it is "[un]like most Congressional enactments" and more nearly "equivalent to [laws, such as municipal charters] enacted by state and local governments...." 434 U.S. 59 at 68, n. 14.

with provisions of the Self-Government Act, and that the administrative authority that decided this case (the Acting Director of DOES) was given such authority by a reorganization which was purportedly inconsistent with the Self-Government Act. He argues that "if their acts of noncompliance are allowed to stand, they would invalidate the [Self-Government] Act." (Jur. Statement at 42; see also Id. at 48). However, it has long been settled that

"the validity of a statute",
as these words are used in this
act of Congress refers to
the power of Congress to pass
the particular statute at
all, and not to mere judicial
construction...."

Baltimore and Potomac R.R. Co. v.

Hopkins, 130 U.S. 210, 226 (1889).

The District of Columbia Court of Appeals certainly did not challenge the authority of the Congress to enact the Self-Government Act. At most, it construed the Self-Government Act to the effect that it does not prohibit the conduct which appellant asserts contravenes that statute.^{8/}

^{8/} The only conduct challenged by Appellant as violative of the Self-Government Act that the District of Columbia Court Appeals had to rule upon was the reorganization by which the authority to decide unemployment cases was transferred to the Director, DOES. The other conduct he challenged, such as the validity of the employment form used in connection with hiring him, was simply irrelevant to the Acting Director's decision. The Court below ignored all these contentions and reached only the jurisdictional issue.

Therefore, there was no decision against the validity of the Self-Government Act withing the meaning of section 1257(1) in this case. See, e.g. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 at 289-90 (1958) (construing federal statute so as not to affect relevant state laws is only a construction of federal law and not an invalidation thereof).

There has been no decision against the validity of a statute of the United States. Therefore, there is no basis for an appeal under Section 1257(1). Accordingly, Appellant's appeal under 28 U.S.C. Section 1257(1) must be dismissed for lack of jurisdiction.

II. NO WRIT OF CERTIORARI SHOULD BE GRANTED

Appellant suggests that if the Court decides it must dismiss his appeal, the Court should grant a writ of certiorari to review the decision below (Jur. Statement at 49). However, this case does not warrant the exercise of this Court's discretionary jurisdiction. The Court has made it clear that it will not review the decisions of the District of Columbia Courts on local matters, absent egregious error. Pernell v. Southall Realty, 416 U.S. 363 at 366 and 368-69 (1974); 28 U.S.C. 1257(3).

Final administrative action on an unemployment compensation claim is clearly a matter of only local ^{9/} concern. This fact was recognized in the development of the Self-Government

9/ See: Report of the Commission on the Organization of the Government of the District of Columbia, House Document No. 92-317, 92nd Cong. 2nd Sess. (1972) (Nelsen Report) Vol. II at 284-287. Unemployment Compensation "programs and activities are normally state and local functions". They "are predominantly for the benefit of District citizens [and] should be an integral part of the District Government...." Id. at 285. "They share the objectives of improving and protecting the status of the worker...." Id. at 286. Administration should be merged with other manpower and labor functions which are "local in nature." Id. at 287.

Act. Thus, Representatives Adams, Chairman of the subcommittee which reported the bill, stated:

"...[T]his is a recommendation of the Nelsen Commission. *** It is simply to transfer...an amalgamation of programs, such as unemployment compensation..., which are generally, throughout the United States, run by the State, the county or the city government [from the federal Government to the Government of the District of Columbia]."^{10/}

10/ Reprinted in Home Rule For The District of Columbia 1973-1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Government Reorganization Act, House Committee Print, 93rd Cong., 2nd Ses. (1974) (hereinafter "Home Rule History") at page 104.

There has been no egregious error in the decision below. (See Argument III below.) There is certainly no problem of general federal law of nationwide application in this case.^{11/} Furthermore, there is no constitutional issue properly before the Court in this case.

As reflected by the decision below and despite Appellant's continuous attempts to inject other issues into this case, the major question before the Court below was whether the agency properly found that Appellant had knowingly misrepresented a material fact in order to obtain unemployment insurance benefits to which he was not entitled.

^{11/} The Self-Government Act is a law "exclusively applicable to the District of Columbia" both because it affects local matters exclusively, and because it serves local purposes.

Nevertheless, appellant asserts that his Fifth Amendment right to due process of the law was denied by the administrative process within DOES and within the District of Columbia Court of Appeals. He asserts that his First Amendment rights to freedom of speech and to petition the Congress have been violated. He appears to assert that the Self-Government Act is unconstitutional if it is not "a statute of the United States" for purposes of appeal under 28 U.S.C. Section 1257(1) (Jur. Statement at viii). He also charges that the Council of the District of Columbia passed ex post facto laws merely to deprive him of his rights. (Jur. Statement at vi and 50).

These constitutional claims are clearly frivolous. The Fifth Amendment argument was found by the District of Columbia Court of Appeals to be "unpersuasive". Indeed the extensive transcript in this case of hearings that extended over a five-month period shows that Appellant was accorded procedural and substantive due process of law.^{12/}

The First Amendment argument is raised (Jur. Statement at 50-51) for the first time in this Court and assumes the existence and truthfulness

^{12/} Record at Tab V.

of facts not in the record on this unemployment compensation claim. See Jur. Statement at vi; 4-5; 9 (par. 2); 11 (par. 2); 14-15; 24 (par. 3) - 25; and 32 (par. 2). Appellant cannot, of course, now raise issues he did not raise below. See e.g., United States v. Ortiz, 422 U.S. 981 at 988 (1975); Matheson v. Branch Bank of State of Alabama, 48 U.S. (7 How.) 260 at 261 (1849). Furthermore, the record is clear that Appellant has fully exercised his First Amendment rights throughout the administrative and judicial review process below.

The assertion that if the Self-Government Act is not a "statute of the United States", then Congress has made an unconstitutional delegation of its legislative authority is specious and has never been raised below. The same is true of the ex post facto law charge.

Moreover, some of the issues that Appellant asserts makes this case of more than local importance are irrelevant to a decision on the matter in question (namely, whether he was properly disqualified from receiving unemployment benefits because of his material misrepresentations in securing them).

Appellant asserts that there were a variety of actions taken in connection with his being hired by the D.C. Office of Employee Appeals (OEA) which were inconsistent with the Self-Government Act. Thus, he asserts that the use by the employer of personnel forms and procedures different from those used by the federal government violated the Self-Government Act; that he was hired for a position in an office for which funds had not been authorized by Congress; and that this also violated the Self-Government Act (See Jur. Statement, pp. 47-48).

Even if these assertions are correct, however, they are simply irrelevant to the issue in this case which is whether appellant knowingly misrepresented that he was unemployed

when he was performing services, had earnings payable, and was also receiving unemployment benefits. The question of whether he had been properly hired is simply irrelevant to that determination. Therefore, issues relating to the hiring of Appellant by OEA are not presented here.

The sole issue involving the Self-Government Act which is relevant to the decision below is whether the Acting Director of DOES had jurisdiction to take the final agency action or whether he lacked jurisdiction because the reorganization vesting that authority in him contravened the Self-Government Act. The District of Columbia Court of Appeals found

no merit to the latter contention.
See 452 A. 2d 1170 at 1173. As is
shown in Argument III below, that
decision is clearly correct.
Accordingly, there are no issues
properly presented in this case which
warrant the Court's grant of a writ of
certiorari.

III. THE FINAL JUDGMENT OF THE DISTRICT
OF COLUMBIA COURT OF APPEALS IS
CLEARLY CORRECT AND SHOULD BE
AFFIRMED

As indicated above, only two issues of significance were decided below. These are 1) whether the Acting Director of DOES had the authority to take the final agency action, and 2) whether the action was supported by substantial evidence and in accordance with applicable law. The Court below unquestionably decided both of these issues, correctly.

A. The Acting Director Had Jurisdiction
To Render The Final Agency Decision

Section 422(12) of the Self-Government Act (D.C. Code 1981, sec. 1-243(12)) authorizes the Mayor to reorganize "offices, agencies, and other entities within the

executive branch ***." In the Court below, Appellant conceded that the District Unemployment Compensation Board (DUCB) was in the executive branch of the District government at least until 1978.^{14/} By Reorganization

^{14/} Appellate brief to the District of Columbia Court of Appeals dated October 8, 1981 (D.C. App. Br.) at p. 32. Appellant there argued that certain Council action subsequent to the reorganization transferring the functions of the District Unemployment Compensation Board to the Director, District of Columbia Department of Labor "took it [the Board] out of the Executive Branch and made it an independent agency ***." In response to Appellant's argument concerning the effect of this subsequent Council action, DOES relied on a memorandum of the then Acting Corporation Counsel of the District of Columbia (attached as an appendix to Respondent's Brief filed with the District of Columbia Court of Appeals on January 26, 1981) showing that while the Council reconstituted the Board for the purposes of issuing regulations, it did not retransfer to the new Board any other authority.

Plan No. 1 of 1978, the Mayor, with the concurrence of the Council of the District of Columbia, abolished the DUCB and transferred its functions to the Director of the newly-established District of Columbia Department of Labor, predecessor to the current Department of Employment Services (DOES). See 25 D.C. Register 2889 (September 29, 1978).

Appellant's argument below (D.C. App. Br., pp. 29-31), which he is apparently reasserting in this Court (Jur. Statement at pp. 44-45) is that the power to reorganize does not include the power to abolish an executive agency.^{15/}

^{15/} In the Self-Government Act, Congress made specific provisions for those agencies it wished to be "independent agencies" and the District Unemployment Compensation Board was not among them. See Sections 491-495 of the Self-Government Act.

However, in enacting the Self-Government Act, Congress made it clear that the Mayor's authority to reorganize included the power to abolish an executive agency. See the remarks of Representative Diggs, principal spokesman for the House-Senate Conference Committee on the Self-Government Act, explaining the Conference Report, 119 Cong. Rec.____ (December 17, 1973), reprinted at Home Rule History, supra, p. 3055 ("the Mayor *** is vested with basic executive authority, including the following: *** establishing, reorganizing and abolishing agencies subject to Council approval ***")(emphasis supplied) Cf. also 5 U.S.C. Section 902(2)(1976) ("'[R]eorganization' means a transfer, consolidation, coordination, authorization, or abolition ***") (emphasis supplied).

There is, therefore, no doubt concerning the Mayor's authority under the Self-Government Act to effect the reorganization which resulted in the Acting Director's jurisdiction in this case.

B. The Proper Standard Of Review Was Used Below To Affirm The Final Administrative Action.

The standard of judicial review of final agency administrative action is to determine whether the findings are supported by substantial evidence in the record and are otherwise in accordance with applicable law. This Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...." Consolidated Edison v. N.L.R.B., 305 U.S. 197 at 229 (1938); accord., Washington Post Company v. District Unemployment Compensation Board, D.C. App., 377 A.2d 436 at 439 (1977).

Furthermore, findings of fact which are supported by substantial evidence are conclusive regardless of whether a reviewing Court might have reached a different conclusion. Section 11(f) of the District of Columbia Unemployment Compensation Act; D.C. Code 1981, sec. 46-112(f). See District of Columbia Administrative Procedure Act, D.C. Code 1981, sec. 1-1509 and sec. 1-1510.

The Court below applied the proper legal standard and found that there was substantial evidence to support the final agency action. See Appendix for the decision below. It sets forth in great detail the substantial evidence in the record from which the Acting Director of DOES reasonably concluded

that claimant knowingly made false statements concerning his employment status.

The Unemployment Compensation Act places a duty upon DOES to properly disburse funds and to recover erroneous payments. This duty is that of a fiduciary, because employers' funds are held in trust for the prompt payment of benefits when due. This implies the duty not to pay if benefits are not due. See section 303(a)(1) of the Social Security Act, 42 U.S.C. sec. 503(a)(1). California Dept. of Human Resources v. Java, 402 U.S. 121 (1971).

Erroneous payments were made to claimant, a fact which he has conceded. by repaying \$1,267 and by waiving the issue prior to the final administrative decision. The error was caused, because claimant while collecting unemployment benefits was also performing services for which he had earnings payable, e.g. he was not unemployed pursuant to the Unemployment Compensation Act.^{16/}

The crucial issue before DOES and the District of Columbia Court of Appeals was whether claimant knowingly misrepresented these material facts. Both found substantial evidence to support such conclusion. There has been

^{16/} The definition of the term "unemployed" is found in section 1(e) of the Unemployment Compensation Act; D.C. Code 1981, sec. 46-101(e). Dyer v. District Unemployment Compensation Board, D.C. App., 392 A.2d 1 at 3 (1978). See footnote 4 above at page 7 which quotes the applicable law.

no error, egregious or otherwise, in the decision below. Appellant has not set forth any legal reasoning in support of his proposition that the Court below erred. Therefore, the decision below is clearly correct and should be affirmed.

CONCLUSION

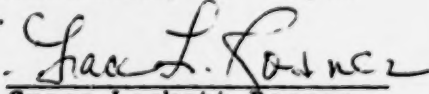
For the reasons more fully stated above, the appeal in No. 82-1098 should be dismissed and no writ of certiorari should be granted; or the decision below should be affirmed.

GRACE LOCKETT ROSNER
General Counsel, DOES
Counsel of Record
for Respondent

CERTIFICATE OF SERVICE

This is certify that I have mailed, postage prepaid, three copies of the foregoing Motion to Dismiss or to Affirm with Supporting Brief by certified mail, return receipt requested, on this 11th day of February, 1983 to Appellant as follows:

Isidoro Rodriguez
604 South View Terrace
Alexandria, VA 22314


Grace Lockett Rosner

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-900

ISIDORO RODRIGUEZ, PETITIONER,

v.

**DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT.**

**Petition for Review of Decision of the
District of Columbia Department
of Employment Services**

(Argued March 10, 1982

Decided August 5, 1982) *

Isidoro Rodriguez *pro se*.

***Grace Lockett Rosner* for respondent.**

Before FERREN, PRYOR, and BELSON, Associate Judges.

PER CURIAM: Petitioner seeks review of a Final Decision of the Acting Director of the District of Columbia Department of Employment Services (the Department) ordering that petitioner be disqualified from receiving unemployment compensation benefits for a period of two years on the ground that petitioner committed fraud in

* The original disposition of this case was by an unpublished Memorandum Opinion and Judgment. Respondent's motion requesting publication was granted by the court.

representing his employment status to the Department.¹ We affirm.

In his petition for review, petitioner alleged that his request to the Department for record material necessary to prepare his appeal of the Appeals Examiner's decision to the Acting Director was not complied with by the agency in accordance with D.C. Code 1981, § 1-1509(c).² We found that the record before us was insufficient to permit a determination whether the Department had complied with petitioner's request. Accordingly, we ordered the record remanded to the Department in order that evidence might be taken and a finding made as to whether the Department had "reasonably and adequately" complied with petitioner's request for record material.³

Pursuant to our order, the Department took evidence, including the sworn testimony of Department employees, that petitioner's requests for record material had been complied with in accordance with the provisions of § 1-1509(c). Petitioner offered no evidence in support of his contention that he had been denied the material, and voluntarily absented himself from the hearing at which testimony was taken.

¹ The Acting Director's Final Decision also affirmed the Appeals Examiner's finding that petitioner had been overpaid by the Department in that he received benefits while employed. Although petitioner seeks review of the Acting Director's determinations with respect to both overpayment and fraud, the record indicates that petitioner conceded overpayment in a hearing before the agency. We consider therefore that the overpayment issue is not before us.

² D.C. Code 1981, § 1-1509(c), provides that the agency shall maintain an official record in each contested case. Record material must be made available to parties to the case upon request. See *Quick v. Department of Motor Vehicles*, D.C. App., 331 A.2d 319 (1975).

³ Order dated March 10, 1982.

The Acting Director's finding, issued pursuant to this court's order, was that petitioner's request for record material was reasonably and adequately complied with. We conclude that the record evidence supports the Acting Director's finding on this issue. We further conclude that there is substantial record evidence to support a finding that petitioner committed fraud upon the Department, and affirm the disqualification imposed by the Acting Director pursuant to D.C. Code 1981, § 46-120(e).⁴

Petitioner is an attorney who specializes in personnel and unemployment compensation law. He was employed by the District of Columbia Government, Office of Personnel, as an "Expert Consultant/Legal Counsel" from April, 1979 to December, 1979. On January 7, 1980, petitioner filed for unemployment compensation benefits. He claimed benefits for the calendar week ending February 9 through the week ending March 22, 1980, and benefits were paid to him for all seven weeks. In accordance with Department regulations, petitioner certified that he was not employed during each of the weeks for which he claimed benefits.

On February 4, 1980, petitioner began performing services for the Office of Employee Appeals. On that date the Office was in an organizational stage and funding for it had not been approved. The Chairperson of the Office of Employee Appeals testified in hearings before the Department that petitioner started working for that office

⁴ D.C. Code 1981, § 46-120(e) provides:

Any person who the Board finds has made a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this chapter may be disqualified for benefits for all or part of the remainder of such benefit year and for a period of not more than 1 year commencing with the end of such benefit year. . . .

as a volunteer and that petitioner did not know "for some time" if or when he would get on the payroll.

On February 20, 1980, petitioner signed a notarized appointment affidavit on which the date of his appointment to a position with the Office of Employee Appeals was designated as February 4, 1980. The record is not clear as to when petitioner first received payment for his services, but it was not later than March 18, 1980, as petitioner has conceded that as of that date he received a check with a notification that he was being paid as an employee of the Office of Employee Appeals.

In accordance with Department procedure, petitioner's employer, the District of Columbia Office of Personnel, was notified that petitioner was claiming benefits. On April 1, 1980, a memorandum was addressed to the Department by the employer requesting a review of petitioner's eligibility for benefits and seeking the imposition of a disqualification for fraud. On the same date, petitioner informed the Department of a possible overpayment and submitted a check in the amount of \$1,000 to be applied thereon pending determination of overpayment by the Department.

A Claims Deputy found that there had been overpayment in the amount of \$1,267 in that petitioner received benefits while employed. The Deputy declined to impose a disqualification for fraud pursuant to § 46-120(e) after concluding that petitioner did not misrepresent willfully his employment status while claiming benefits. The Claims Deputy based his conclusion in part on his own belief that "a person knowledgeable of the laws [would not] jeopardize [not only] his employment and profession but his future as a lawyer to obtain an extra \$181 per week illegally, when his annual average income is presently over \$40,000."

Petitioner appealed the determination of overpayment and the District of Columbia appealed the determination of no disqualification for fraud. Hearings were held before the Appeals Examiner between July and December, 1980. On February 20, 1981, the Appeals Examiner issued his decision that the prior determinations of overpayment and no fraud be affirmed. The Appeals Examiner indicated his reliance upon the opinion of the Claims Deputy with respect to the fraud issue. Petitioner and the District of Columbia appealed the Appeals Examiner's decision to the Acting Director of the Department. On July 17, 1981, the Acting Director issued a Final Decision affirming the Appeals Examiner on the issue of overpayment but reversing on the issue of fraud. The Acting Director concluded that application of the subjective test set forth in *Jacobs v. District Unemployment Compensation Board*, D.C.App., 382 A.2d 282 (1978) to the facts of the instant case compelled a determination that petitioner knowingly misrepresented his employment status and committed fraud upon the Department. We sustain that conclusion.

We have held that the elements of a § 46-120(e) violation essentially track the common law requirements for proof of fraud, those elements being, false representation of a material fact or failure to disclose a material fact, knowledge of the falsity, intention to induce reliance upon the misrepresentation, and actual reliance. *Id.* at 286. Whether a claimant has knowledge of the falsity at issue is to be determined by reference to a subjective standard, *i.e.*, the state of mind of the claimant rather than that of a reasonable person in the position of the claimant is to be considered. *Id.* at 287. The Appeals Examiner's reference to the Claims Deputy's opinion concerning the motives of an individual in petitioner's position indicates that the Appeals Examiner incorrectly applied

a reasonable person test, rather than the subjective test mandated by *Jacobs*.

In addition, there is sufficient record evidence to sustain the Acting Director's finding that petitioner knowingly made false statements concerning his employment status. The Acting Director noted that appellant was an attorney experienced in personnel matters and familiar with all District of Columbia unemployment compensation procedures. In other words, he is presumed to be aware of the legal requirement in this jurisdiction that to be eligible for compensation under the District of Columbia Unemployment Compensation Act, an individual must not have performed any services or received any earnings during the period benefits are claimed. *Dyer v. District of Columbia Unemployment Compensation Board*, D.C. App., 392 A.2d 1, 3 (1978). He is also presumed to be aware of the statutory definition of "earnings" as all remuneration payable for personal services. See D.C. Code 1981 § 46-120(d).

Petitioner signed an appointment affidavit on February 20, 1980, indicating that his appointment was effective February 4, 1980. He thus was chargeable as of February 20, with knowledge that he was employed and had earnings due him beginning February 4, 1980. Moreover, at the latest by March 18, 1980, petitioner received a pay stub indicating he was being paid as an employee of the Office of Employee Appeals. The D.C. Payroll Register indicates that he was paid on that date for a period commencing February 24, 1980. A Certificate of Wage Earnings which accompanies payroll checks to D.C. government employees was issued for the pay period ending March 8, 1980. In the normal course, petitioner would have received the certificate on March 22, 1980. Nevertheless, on March 26, 1980, petitioner certified that he was un-

employed through the period ending March 22, 1980, and accepted benefits for that period.

Petitioner's explanation that he believed payments he received in March 1980, were in payment of a claim against his former employer, the Office of Personnel, reasonably could have been found unconvincing in light of the complete lack of evidence that petitioner was ever notified that the claim was settled or that he was receiving payment on that claim.

In addition to alleging that there is insufficient record evidence to support the Acting Director's finding of fraud, petitioner asserts that the Department is without jurisdiction to adjudicate unemployment compensation claims; that proceedings before the Department were not conducted in accordance with the due process requirements of the Fifth Amendment and the provisions of the District of Columbia Administrative Procedure Act, and that the Appeals Examiner was not impartial, but was subject to the control of unnamed "higher authorities." We find these arguments unpersuasive, and affirm the Final Decision of the Acting Director of the District of Columbia Department of Employment Services.

Affirmed.